Supreme Court, U.S.
FILED
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No. 93-5131

In The

Supreme Court of the United States

October Term, 1993

PAUL PALALAUA TUILAEPA,

Petitioner,

vs.

CALIFORNIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of California

JOINT APPENDIX

HOWARD W. GILLINGHAM*
4370 Tujunga Avenue
Suite 105
North Hollywood, California
91604
Telephone: (818) 763-4775
[Fax: (818) 763-5822]

Counsel for Petitioner

DANIEL E. LUNGREN
Attorney General
DONALD DE NICOLA*
Deputy Attorney General
300 South Spring Street
Fifth Floor
Los Angeles, California
90012
Telephone: (213) 897-2357
[Fax: (213) 897-2408]

Counsel for Respondent

*Counsel of Record

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Event	Date
Crime	October 6, 1986
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Jury Trial	
Jury Selection Begins	July 30, 1987
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Penalty Phase Testimony Begins	August 10, 1987
Penalty Phase Testimony Ends and Arguments	August 12, 1987
Penalty Phase Deliberations Begin	August 12, 1987
Penalty Phase – Jury Reports Deadlock	August 13, 1987
Penalty Phase – Jury Returns Death Verdict	August 14, 1987
Judgment Imposed	September 25, 1987

[833] LONG BEACH, CALIFORNIA; WEDNESDAY, AUGUST 12, 1987;

3:10 P.M.

DEPARTMENT SOUTH "G" HON. ELSWORTH M. BEAM, JUDGE

(APPEARANCES AS HERETOFORE NOTED.)

THE COURT: GOOD MORNING, LADIES AND GENTLEMEN. MR. SLICK.

MR. SLICK: REST.

THE COURT: ANYTHING FURTHER?

MR. HODGMAN: NO.

THE COURT: WE REVIEWED THE JURY INSTRUCTIONS. ARE YOU READY TO COMMENCE CLOSING ARGUMENT?

MR. HODGMAN: I AM, YOUR HONOR.

MR. SLICK: I'M READY.

THE COURT: ALL RIGHT.

MR. HODGMAN, [sic] YOU MAY PROCEED.

MR. HODGMAN: THANK YOU, YOUR HONOR.

OPENING ARGUMENT

BY MR. HODGMAN:

YOUR HONOR, FELLOW COUNSEL.

GOOD MORNING, LADIES AND GENTLEMEN OF THE JURY.

THIS MORNING, THERE WILL BE NO FIRE ORATION FROM ME.

THERE WILL BE NO FIRE AND BRIMSTONE, NO COURTROOM THEATRICS OR DRAMATICS.

QUITE SIMPLY THIS IS NOT THE TIME NOR IS [834] IT THE PLACE FOR IT.

I'VE THOUGHT QUITE A BIT ABOUT THIS MOMENT FOR QUITE SOMETIME.

FOR QUITE SOMETIME I KNEW PERHAPS I WOULD HAVE TO STAND IN FRONT OF YOU TODAY AND I'D HAVE TO TALK ABOUT CERTAIN UNPLEASANT THINGS, AND I KNEW THAT I WOULD BE ASKING OF YOU THAT YOU RETURN A VERDICT OF DEATH AS TO THE DEFENDANT IN THIS CASE, MR. TUILAEPA.

IN FACT, I'M GOING TO ASK A LITTLE BIT MORE THAN THAT.

I'M GOING TO EXPLAIN TO YOU WHY THAT VERDICT, THAT IS, THE VERDICT OF DEATH, IS REALLY LEGALLY AND IN LIGHT OF THE EVIDENCE THAT HAS BEEN PRESENTED IN THIS CASE THE ONLY RIGHT AND APPROPRIATE VERDICT THAT SHOULD BE RENDERED BY YOU IN THIS CASE.

AND I WANT YOU TO KNOW THIS IS NOT AN EASY THING FOR ME TO DO.

I'VE THOUGHT ABOUT THIS A LITTLE BIT, AND I'VE THOUGHT ABOUT HOW IN LIFE THERE ARE

REALLY VERY FEW OCCASIONS WHEN ONE IS CALLED UPON TO DEAL WITH A LIFE OR DEATH ISSUE, THAT IS, TO CONFRONT DEATH.

IN WAR, PERHAPS, YOU HAVE TO CONFRONT DEATH.

FOR CERTAIN OF OUR PEACE OFFICERS, AS THEY REPRESENT, IN EFFECT, THAT THIN LINE BETWEEN THE CRIMINAL ELEMENT AND OUR SOCIETY IN THE LAWABIDING ASPECT OF SOCIETY, PERHAPS SOMETIMES THEY HAVE TO FACE DEATH. PERHAPS THEY HAVE THOSE DECISIONS.

[835] PERHAPS DOCTORS IN EMERGENCY ROOMS DEALING WITH A SUDDEN MEDICAL CRISIS HAVE TO DEAL WITH THOSE SAME ISSUES AND SEE THE QUICK PASSING OF LIFE BEFORE THEM, AND THAT IS TRAGIC.

BUT, AS I'VE THOUGHT ABOUT THIS CASE, I'VE THOUGHT ABOUT WHAT I COULD SAY TO YOU THIS MORNING.

I THOUGHT THERE WAS ANY GREATER WISDOM OR GREATER INSIGHT THAT I COULD GIVE TO YOU.

AND THE MORE I THOUGHT ABOUT IT, THE MORE I THOUGHT PROBABLY NOT.

THAT PROBABLY AS YOU SIT HERE NOW, THE ANSWER WITH REGARD TO THIS QUESTION THIS RATHER LARGE QUESTION IS ALREADY WITHIN YOU.

AND I HAVE A FEELING AND I TRUST THAT AS YOU WORK TOGETHER TO ARRIVE AT A FAIR AND

APPROPRIATE VERDICT AT THIS PHASE OF THE CASE, THAT YOU WILL ARRIVE AT THE APPROPRIATE RESULT, THAT YOUR COLLECTIVE WISDOM, YOUR COLLECTIVE INPUT WILL GUIDE YOU TO THAT APPROPRIATE RESULT.

AND THIS IS NOT AN EASY THING FOR YOU.

IN THIS CASE, YOU AS JURORS HAVE HAD TO CONFRONT DEATH AS WELL.

YOU HAVE HAD TO CONFRONT DEATH INITIALLY IN THIS CASE DURING THE GUILT PHASE PORTION OF THE CASE.

YOU HEARD, AS PRESENTED THROUGH THE TESTIMONY OF QUITE A FEW WITNESSES, ABOUT THE VIOLENT MURDER OF A MAN IN A BAR LAST OCTOBER.

[836] YOU ALSO HEARD ABOUT THE NEAR VIOLENT MURDER OF THREE OTHER MEN AS WELL.

IT WAS THAT CLOSE TO BEING FOUR DEAD BODIES THERE AT THE WANDER INN BAR.

AND YOU HAVE TO CONFRONT THIS ISSUE JUST AS YOU HAVE TO CONFRONT THE SAME ISSUE HERE AT THE PENALTY PHASE OF THE CASE.

NOW, IT'S A LITTLE BIT DIFFERENT FOR YOU.

YOU HAVE DETERMINED THAT THE DEFENDANT IS GUILTY OF FIRST DEGREE MURDER.

YOU HAVE DETERMINED THAT THE SPECIAL CIRCUMSTANCE IS TRUE.

AND YOU HAVE DETERMINED THAT THE OTHER COUNTS THAT WERE CHARGED AGAINST THE DEFENDANT ARE TRUE AS WELL, THAT, IN EFFECT, THE DEFENDANT IS GUILTY OF THOSE AS WELL.

BUT JUST THE SAME, YOU HAVE TO CONFRONT THE ISSUE OF LIFE OR DEATH ONCE AGAIN.

AND I THINK IT'S IMPORTANT TO RECOGNIZE AS YOU DO THIS THAT THERE ARE PEOPLE IN THIS SOCIETY WHO DO NOT VALUE HUMAN LIFE PERHAPS AS YOU OR I DO.

THAT'S ONE REASON WHY THIS PHASE OF THE CASE IS PERHAPS A LITTLE DIFFICULT FOR ALL OF US, BECAUSE GENERALLY, AS HUMAN BEINGS, WE VALUE HUMAN LIFE.

WE EMBRACE LIFE.

WE ALL HOPE TO LIVE LONG AND FULFILLING LIVES.

[837] AND AS YOU KNOW FROM THIS CASE, MELVIN WHIDDON DID NOT HAVE THAT OPPORTUNITY.

AND HE DIDN'T GET THAT OPPORTUNITY BECAUSE OF THE INDIVIDUAL WHO IS CHARGED HAD THIS CASE, PAUL TUILAEPA, IS NOT THE SORT OF PERSON WHO VALUES HUMAN LIFE, AND THAT EVIDENCE HAS SHOWN THAT.

HE DOESN'T EMBRACE LIFE IN THE SAME SENSE AND REGARD IT IN THE SAME HIGH ESTEAM, [sic] THE SAME HIGH VALUE THAT YOU AND I DO AND THE EVIDENCE SHOWS NOW, I CAN RECALL FROM

THE FIRST MOMENTS IN THIS CASE WHEN I ADDRESSED YOU, AND I TALKED TO YOU IN MY OPENING STATEMENT ABOUT WHAT HAPPENED IN THE WANDER INN BAR ON THE NIGHT OF OCTOBER THE SIXTH, 1986.

I GAVE YOU AN OVERVIEW OF WHAT OCCURRED.

AND ON SOME OF YOUR FACES, I COULD SEE THE SHOCK REGISTER.

ON SOME OF YOUR FACES, I SAW WHAT APPEARED TO BE ALMOST DISBELIEF, THAT IS, HOW CAN SOMETHING THIS HORRIBLE HAPPEN.

IT'S A SENSELESS, RANDOM TRAGEDY.

IT COULD HAVE BEEN ANY ONE OF US IN A BAR, MONDAY NIGHT FOOTBALL. SOMETHING AS INNOCENT AS THAT, GOING TO WATCH MONDAY NIGHT FOOTBALL IN A BAR IN THE FALL TURNING INTO AN ABSOLUTE BLOOD BATH.

AND THE THING IS, IT HAPPENED.

THESE SORTS OF THINGS DO HAPPEN IN OUR SOCIETY.

AND FROM THE EVIDENCE IN THIS CASE, YOU [838] KNOW IT HAPPENED, AND YOU HAVE DETERMINED THAT THIS DEFENDANT, PAUL TUILAEPA, IS RESPONSIBLE FOR THAT.

SO NOW YOU TURN TO THIS PHASE OF THE CASE, TO THE PENALTY PHASE OF THE CASE, AND IT'S UP TO YOU JURORS TO DECIDE COLLECTIVELY

WHAT IS THE APPROPRIATE PENALTY, WHAT IS JUSTIFIED AND APPROPRIATE IN YOUR EYES AND MOST PARTICULARLY AS WELL IN THE EYES OF THE LAW.

BECAUSE, WHEN YOU TOOK THE OATH TO BECOME JURORS IN THIS CASE, YOU TOOK AN OATH TO FOLLOW THE LAW.

JUDGE BEAM WILL TELL YOU WHAT THE LAW IS WITH REGARD TO THIS PHASE OF THE CASE, AND I'M GOING TO MENTION IT BRIEFLY TO YOU THIS MORNING.

BUT IT'S IMPORTANT FOR YOU TO FOLLOW THE LAW, AND IT TAKES A LITTLE BIT OF MORAL COURAGE ON YOUR PART TO DO THAT, TO FOLLOW THE LAW.

YOU WILL WRESTLE WITH CERTAIN EMOTIONS IN THAT JURY ROOM, BUT ULTIMATELY, YOUR DECISION HAS TO COME DOWN TO THIS: IN THE EYES OF THE LAW AND IN LIGHT OF THE EVIDENCE AND THE LAW THAT JUDGE BEAM GIVES YOU, IS YOUR VERDICT THE APPROPRIATE ONE.

SO, I AM GOING TO TURN MY ATTENTION RIGHT NOW TO THE LAW JUST A LITTLE BIT.

I'M GOING TO ACQUAINT YOU WITH A PORTION OF ONE INSTRUCTION.

AFTER I DO THIS, I'M GOING TO DISCUSS SOME OF THE EVIDENCE THAT IS PERTINENT TO THIS PARTICULAR [839] INSTRUCTION.

BUT THIS LITTLE PASSAGE THAT I'M ABOUT TO READ TO YOU IS PRETTY MUCH THE ESSENCE OF THE CASE.

THIS IS THE FUNDAMENTAL ISSUE THAT CONFRONTS YOU AT THIS PHASE OF THE CASE.

YOU WILL BE TOLD ABOUT VARIOUS FACTORS IN AGGRAVATION AND VARIOUS FACTORS IN MITIGATION.

AND IN WEIGHING THOSE VARIOUS CIRCUMSTANCES, YOU DETERMINE UNDER THE RELEVANT EVIDENCE WHICH PENALTY IS JUSTIFIED AND APPROPRIATE BY CONSIDERING THE TOTALITY OF THE AGGRAVATING CIRCUMSTANCES WITH THE TOTALITY OF THE MITIGATING CIRCUMSTANCES.

TO RETURN A JUDGMENT OF DEATH, EACH OF YOU MUST BE PERSUADED THAT THE AGGRAVATING EVIDENCE IS SO SUBSTANTIAL IN COMPARISON WITH THE MITIGATING CIRCUMSTANCES THAT IT WARRANTS DEATH INSTEAD OF LIFE WITHOUT POSSIBILITY OF PAROLE.

SO, WHAT THIS FORMULA INVOLVES, THEN, IS A COMPARISON, A COMPARISON OF THE EVIDENCE THAT WAS PRESENTED IN AGGRAVATION WITH THE EVIDENCE THAT WAS PRESENTED IN MITIGATION.

AND THIS IS THE TEST THAT YOU WILL USE AS YOU FOLLOW THE LAW AND ARE GUIDED TO A JUST VERDICT IN THIS CASE.

AND I'LL TELL YOU RIGHT NOW QUITE CANDIDLY, THIS IS NOT AN ARBITRARY OR MECHANICAL FORMULA.

[840] YOU JURORS DETERMINE WHAT WEIGHT TO GIVE TO EACH ITEM OF EVIDENCE THAT WAS PRESENTED, WHETHER I PRESENTED IT OR MR. SLICK PRESENTS IT.

BUT ULTIMATELY THE 12 OF YOU WILL HAVE TO DETERMINE THE RELATIVE SCALE OF THE TWO, THE RELATIVE WEIGHT AND CONVINCING FORCE OF ALL ASPECTS OF THE EVIDENCE.

AND IF YOU FIND THAT THE AGGRAVATING EVIDENCE SUBSTANTIALLY OUTWEIGHS THE MITIGATING EVIDENCE, THEN YOU ARE DUTYBOUND TO RETURN BY LAW A VERDICT OF DEATH AS TO THIS DEFENDANT.

SO, I'D LIKE TO TALK FOR A FEW MINUTES ABOUT THE NATURE OF THE EVIDENCE THAT WAS PRESENTED IN THE PENALTY PHASE OF THIS CASE AS WELL AS THE CASE THROUGHOUT.

JUDGE BEAM WILL TELL YOU THAT, AS YOU CONSIDER WHAT PENALTY SHOULD BE APPLIED IN THIS PARTICULAR CASE, YOU ARE TO CONSIDER THE EVIDENCE THAT WAS PRESENTED IN THE GUILT PHASE OF THE CASE AS WELL AS THE EVIDENCE THAT WAS PRESENTED IN THE PENALTY PHASE OF THE CASE.

SO TURNING TO WHAT MIGHT POSSIBLY BE ARGUED BY MR. SLICK AS EVIDENCE IN MITIGATION.

AND SOMETHING THAT I'M SURE HE WILL ASK OF YOU THAT IS SO COMPELLING THAT IT REALLY OUTWEIGHS THE AGGRAVATING EVIDENCE.

BY MY CALCULATION, I CAN THINK OF ABOUT FOUR THINGS THAT MIGHT BE ARGUED.

[841] ONE THING, FIRST OFF, WOULD BE THE DEFENDANT'S APPARENT AGE.

FROM THE TESTIMONY, IT'S APPARENT THAT THE DEFENDANT IS ABOUT IN HIS EARLY TWENTIES, AND I SUPPOSE AN ARGUMENT COULD BE MADE, WELL, THE DEFENDANT IS TOO YOUNG TO HAVE THE DEATH PENALTY IMPOSED UPON HIM.

WELL, IT'S UP TO YOU TO DETERMINE WHAT WEIGHT TO GIVE TO THAT PARTICULAR FACTOR.

BUT I'D LIKE YOU TO CONSIDER A COUPLE OF THINGS, IF THAT ARGUMENT IS MADE TO YOU, AND TO TEMPER THE THRUST THE [sic] OF THAT ARGUMENT IF IT IS MADE WITH THE FOLLOWING CONSIDERATIONS:

THE DEFENDANT, PAUL TUILAEPA, IS OLD ENOUGH AT THIS POINT IN TIME TO HAVE SPENT SOMETIME INCARCERATED.

AND YOU KNOW FROM THE EVIDENCE THAT FOR AT LEAST FOUR YEARS WITHIN RECENT MEMORY HE HAS BEEN IN THE CUSTODY OF THE CALIFORNIA YOUTH AUTHORITY, 1982, 1984, 1985, 1986.

SO, IN A CRIMINAL SENSE, HE HAS A CERTAIN MATURITY WHICH BELIES THE NUMBER OF YEARS, PERHAPS, THAT HE HAS BEEN ON THE FACE OF THIS EARTH.

SECONDLY, I WANT YOU TO THINK ABOUT THE FACT THAT THE DEFENDANT WAS OLD ENOUGH TO

DECIDE TO PLAN AS WELL AS COMMIT A ROBBERY, TO BREAK THE LAW TO COMMIT A FELONY OFFENSE.

HE HAD ENOUGH MATURITY, ENOUGH [842] SOPHISTICATION TO PLAN AND EXECUTE THIS FELONY TYPE OFFENSE, A ROBBERY.

AND NOT ONLY THAT, IN THE EXECUTION OF THIS ROBBERY, THE DEFENDANT, IN EFFECT, EXECUTED MAN, A HUMAN BEING.

AND THINK ABOUT THAT ROBBERY, THINK ABOUT WHAT HE DID.

WE'VE DISCUSSED OPTIONS THAT HE MAY HAVE HAD AT THE TIME, BUT JUST IN TERMS OF WHAT YOU KNOW HE DID.

HE TOOK THAT RIFLE AND HE DECIDED TO FIRE IT, NOT ONCE, NOT TWICE, NOT THREE TIMES, BUT FOUR TIMES.

FOUR TIMES THE DEFENDANT SQUEEZED THAT TRIGGER, AND FOUR TIMES A LITTLE HUNK OF LEAD, A LITTLE LEAD PROJECTILE WENT SPINNING OUT THE END OF THAT RIFLE AIMED AND TARGETED AT A HUMAN BEING.

THE OTHER ASPECT OF THIS CASE, MR. SLICK TALKED ABOUT, IT WAS ONLY A .22, ONLY A .22, AND YET YOU SAW THE DAMAGE THAT THAT LITTLE HUNK OF LEAD CAN CAUSE.

YOU KNOW WHAT IT DID TO EACH OF THE FOUR VICTIMS WHO WERE ON THE RECEIVING END OF THE LEAD PROJECTILE IN EACH INSTANCE.

THAT BULLET TORE THROUGH FLESH, IT RIPPED APART ARTERIES. IT TORE THROUGH INTERNAL ORGANS SUCH AS LUNGS AND KIDNEYS.

YOU KNOW WHAT DAMAGE IT DID. FOUR HUMAN [843] BEINGS FELT THE IMPACT OF THIS DEFENDANT'S GUNSHOTS.

FOUR HUMAN BEINGS FELT THE PAIN OF BEING SHOT WITH A GUN.

FOUR HUMAN BEINGS, UPON BEING HIT BY A BULLET, HAD TO WONDER, AM I GOING TO LIVE OR AM I GOING TO DIE.

AND YOU KNOW THE NATURE OF THE WOUNDS, THESE WERE ALL SERIOUS, LIFE-THREATENING WOUNDS.

AND YOU KNOW IN THE CASE OF MELVIN WHIDDON, HE DID DIE. HE WAS KILLED BY THIS DEFENDANT.

AND THE OTHERS, BRUCE MONROE, KELVIN WHIDDON, KEN BOONE, WERE ALL DARN LUCKY THAT THEY DID NOT DIE AS WELL.

SO, AS YOU THINK ABOUT THE DEFENDANT'S AGE, THINK ABOUT WHAT HE DID.

AND I SUBMIT TO YOU, LADIES AND GENTLEMEN, YOU CAN'T PASS THIS OFF AS THE MERE FOLLY OF YOUTH.

AGE IS NOT AN EXCUSE.

DEFENDANT, IN THIS CASE, IS OLD ENOUGH TO BE HELD ACCOUNTABLE FOR WHAT HE DID, AND I

SUBMIT TO YOU HE MADE THE DECISION TO KILL, AND IN LIGHT OF THAT, HE IS A FIT SUBJECT TO FACE THE DEATH PENALTY.

ANOTHER FACTOR THAT MIGHT BE RAISED BY MR. SLICK WOULD BE WITH REGARD TO DR. MALONEY'S TESTIMONY.

THE APPARENT PURPOSE OF DR. MALONEY'S TESTIMONY WAS TO TELL YOU THAT THE DEFENDANT IN THIS CASE APPARENTLY HAS A SUBNORMAL IQ.

[844] WELL, AGAIN, I LEAVE IT TO YOU TO DETERMINE WHAT WEIGHT THAT FACT SHOULD HAVE IN LIGHT OF ALL THE TOTALITY OF THE EVIDENCE THAT'S BEEN PRESENTED TO YOU.

BUT, AGAIN, TEMPER THAT EVIDENCE WITH THESE CONSIDERATIONS:

THE DEFENDANT APPARENTLY HAS NO ORGANIC BRAIN DAMAGE AS TESTIFIED TO BY DR. MALONEY.

NO NEUROLOGICAL DISIF YOU KNOW /SHUPB.

HE HAS A LOW IQ.

BUT HE HAS SUFFICIENT INTELLIGENCE TO KNOW RIGHT FROM WRONG.

IT DOESN'T TAKE A GENIUS TO KNOW RIGHT FROM WRONG.

IT DOESN'T TAKE A GENIUS TO KNOW THAT IT'S WRONG TO BREAK THE LAW, THAT IT'S WRONG TO

ROB SOMEONE, THAT IT'S WRONG TO KILL SOMEONE IN THE FASHION THAT MR. TUILAEPA DID IN THIS CASE.

HE HAD SUFFICIENT INTELLIGENCE TO FUNCTION IN LIFE.

AND I SUBMIT TO YOU THE FACT OF AN APPARENT SUBNORMAL IQ CARRIES VERY LITTLE WEIGHT IN THIS ANALYTICAL PROCESS THAT YOU'RE ENGAGED IN.

THERE'S ANOTHER FACTOR AS WELL THAT COULD BE RAISED, AND YOU ARE TO CONSIDER ANY FACT THAT WAS PRESENTED BY THE EVIDENCE IN THE GUILT PHASE WHICH MIGHT SERVE AS AN EXTENUATING CIRCUMSTANCE WHICH SOMEHOW MIGHT TEND TO EXCUSE A LITTLE BIT THE [845] DEFENDANT'S BEHAVIOR DESPITE THE FACT THAT YOU HAVE FOUND HIM GUILTY OF THESE CRIMES, SOMETHING THAT DOESN'T AMOUNT TO A LEGAL DEFENSE WHICH EXTENUATES OR EXCUSES WHAT HE DID JUST A LITTLE BIT.

I WOULD EXPECT IN THIS VEIN AN ARGUMENT COULD BE MADE THAT MELVIN WHIDDON WOULD BE ALIVE TODAY HAD HE NOT PUNCHED THE OTHER ROBBER, THAT SOMEHOW MELVIN WHIDDON SET THE STAGE FOR HIS OWN DEMISE.

WITH REGARD TO THAT, WE'VE DISCUSSED THAT A LITTLE BIT IN THE GUILT PHASE OF THIS CASE.

TALKED ABOUT THE DEFENDANT HAD A PANOPLY OF NON-DEADLY ALTERNATIVES AVAILABLE

TO HIM WHEN HE WENT OVER TO CONFRONT MELVIN WHIDDON AND THE OTHERS IN THAT BAR.

HE COULD HAVE BRANDISHED THE RIFLE. HE COULD HAVE VERBALLY THREATENED. HE COULD HAVE FIRED INTO THE GROUND. HE COULD HAVE FIRED INTO THE CEILING, BUT HE DID NOT.

HE SHOT MELVIN WHIDDON.

AND TO AFFIX THE FOCUS OF THIS EVENT, OF MELVIN WHIDDON PUNCHING THE OTHER ROBBER, AS AN EXTENUATING CIRCUMSTANCE, I SUBMIT TO YOU IS TAKING THE PROPER FOCUS AWAY FROM THE DEFENDANT AND PLACING IT UPON A VICTIM, AND THAT'S NOT RIGHT.

MELVIN WHIDDON DIDN'T ASK TO DIE THAT NIGHT.

HE CERTAINLY DIDN'T WANT TO GET SHOT.

IT WAS THE DEFENDANT WHO MADE THAT [846] DECISION FOR HIM.

IT WAS THE DEFENDANT WHO FIRED THAT SHOT WHO MADE THE DECISION TO KILL MELVIN WHIDDON, AND MELVIN WHIDDON DIED, AS YOU KNOW, ON THE SIDEWALK OUTSIDE THE BAR OF THE WANDER INN ON PACIFIC AVENUE LAST OCTOBER.

HE DIDN'T GO TO THE BAR WANTING THAT.

THE DEFENDANT MADE THAT DECISION.

THE DEFENDANT KILLED HIM.

SO, IF THIS ARGUMENT IS RAISED, BARE [sic] IN MIND THE PROPER FOCUS IS NOT UPON WHAT MELVIN WHIDDON DID, BUT UPON WHAT THE DEFENDANT DID LAST NIGHT.

THE DEFENDANT WAS THE ONE WHO KILLED, THE ONE WHO SHOT AT [sic] UNARMED INNOCENT MAN IN A BAR THAT NIGHT.

LASTLY, IT COULD BE ARGUED THAT YOU SHOULD IMPOSE LIFE WITHOUT POSSIBILITY OF PAROLE UPON THE DEFENDANT OUT OF SYMPATHY FOR THE DEFENDANT, PERHAPS EVEN EXTENDING THAT, OUT OF SYMPATHY FOR HIS FAMILY.

HIS FAMILY HAS BEEN HERE THROUGHOUT THE TRIAL IN APPARENT SUPPORT OF THE DEFENDANT, HAVE HAD A CHANCE TO LOOK AT HIM ALMOST EVERY DAY OF THE TRIAL.

HIS MOTHER TESTIFIED. HIS SISTER TESTIFIED.

I THINK IT WOULD BE QUITE NATURAL FOR YOU TO FEEL SOME SYMPATHY, TO HAVE SOME FEELING FOR THE DEFENDANT'S MOTHER AS WELL AS THE SISTER.

I THINK THAT IS THAT'S [sic] NATURAL.

[847] THE PROBLEM IS, THOUGH, WITH REGARD TO THE DEFENDANT, IS HE DESERVING, BASED UPON THE EVIDENCE, OF THAT SAME SYMPATHY OF, OF THAT SAME MERCY YOU CAN FEEL FOR MRS. TUILAEPA AND HIS DAUGHTER.

BUT AT THE SAME TIME, YOU HAVE TO SEGREGATE AND DISCRIMINATE THE [sic] BETWEEN THE

DEFENDANT AND WHAT HE DID AND WHAT HIS FAMILY TESTIFIED TO.

ONE THING TO NOTE ABOUT THEIR TESTIMONY IS THIS:

THE DEFENDANT CANNOT CAST THE BLAME FROM HIS OWN SHOULDERS, CAST THAT RESPONSIBILITY UPON PARENTAL NEGLECT OR UPON NEGLECTFUL SOCIETY.

HIS MOTHER TESTIFIED TO THE BEST OF HER ABILITY. SHE TRIED TO INSTILL THE PROPER VALUES IN LIFE UPON THE DEFENDANT.

THE DEFENDANT'S SISTER APPARENTLY GREW UP IN THE SAME ENVIRONMENT, IN THE SAME HOUSEHOLD, AND SHE HAS GONE ON TO BECOME EDUCATED, TO HAVE HER OWN FAMILY.

BY ALL APPEARANCES, WE CAN INFER THAT SHE IS A LAWABIDING CITIZEN.

SO, THE DEFENDANT CANNOT THROW THE BLAME FROM HIMSELF ON TO HIS PARENTS OR UPON SOCIETY.

HE HAS TO SHOULDER THAT BLAME HIMSELF.

HE DID THOSE THINGS IN THE BAR, AND HE IS THE ONE THAT HAS TO STAND ACCOUNTABLE.

SO YOU CAN FEEL FOR THE DEFENDANT'S MOTHER.

[848] YOU CAN FEEL FOR HIS SISTER.

YOU CAN FEEL FOR THE REST OF THE FAMILY.

BUT, THE DEFENDANT IS NOT DESERVING OF YOUR SYMPATHY.

HE'S NOT DESERVING, QUITE SIMPLY, BECAUSE OF WHAT HE DID.

MR. SLICK MAY TALK ABOUT OTHER THINGS, BUT I'M GOING TO LEAVE THAT TO HIM.

I WANT TO TURN FOR A FEW MINUTES TO THE OTHER SIDE OF THE CASE, AT LEAST THIS PHASE OF THE CASE, AND THAT IS THE PENALTY PHASE EVIDENCE AND THE EVIDENCE THAT WAS PRESENTED IN AGGRAVATION.

THE EVIDENCE IN AGGRAVATION THAT WAS PRESENTED TO YOU REALLY FALLS INTO TWO CATEGORIES.

CATEGORY NUMBER ONE IS THE FACTS AND CIRCUMSTANCES OF THE CRIMES FOR WHICH YOU HAVE FOUND THE DEFENDANT GUILTY.

THE SECOND CATEGORY RELATES TO CERTAIN BEHAVIOR, CRIMINAL TYPE BEHAVIOR IN THE PAST THAT REFLECTS EITHER VIOLENCE INHERENTLY OR THE IMPLICATION OF VIOLENCE BY WAY OF THREAT, AND THIS GETS INTO THE VARIOUS REPRESENTATIVES FROM THE CALIFORNIA YOUTH AUTHORITY WHO CAME AND TESTIFIED FOR YOU.

THEY GAVE YOU SOME INSIGHT INTO THE DEFENDANT'S BACKGROUND ASIDE FROM WHAT THE DEFENDANT GAVE YOU.

AND THIS INSIGHT, STARTING WITH THIS LATTER CATEGORY FIRST, IS VERY REVEALING.

[849] WE HAD A NUMBER OF THINGS THAT OCCURRED OUT THERE IN THE CALIFORNIA YOUTH AUTHORITY AS WELL AS IN THE LOCK-UP PORTION OF THIS COURTHOUSE WHILE YOU WERE BEING SELECTED AS JURORS TO HEAR THIS CASE.

AND THERE IS A COMMON THREAT THAT RUNS THROUGHOUT ALL OF THIS PENALTY PHASE EVIDENCE THAT WAS PRESENTED TO YOU.

THE COMMON THREAT IS THIS:

ALL OF THESE EVENTS OCCURRED WHILE THE DEFENDANT WAS IN [sic] INCARCERATED, WHILE HE WAS IN CUSTODY.

AND I WANT TO HAVE YOU PAUSE FOR A MOMENT AND THINK ABOUT IT, BECAUSE THERE IS A TENDENCY TO FEEL THAT MERELY BECAUSE SOMEONE IS IN THE YOUTH AUTHORITY OR IN JAIL, THEY'RE OUT OF SITE, [sic] THEY'RE OUT OF MIND.

IT'S LIKE THEY FALL OFF THE FACE OF THE EARTH.

AND THAT'S ONLY BECAUSE FROM YOUR PERSPECTIVE IN A FREE AND OPEN NON-INCARCERATED SOCIETY, THAT IS TRUE.

WE DON'T SEE THE PEOPLE WHO ARE INCARCERATED.

BUT THE FACT IS, THEY'RE THERE, BUT MERELY IN A DIFFERENT TYPE OF SOCIETY.

THEY ARE IN AN INCARCERATED SOCIETY.

AND IN AN INCARCERATED SOCIETY, YOU CAN HAVE WHAT WAS REVEALED TO YOU DURING THE PENALTY PHASE [850] OF THIS CASE.

YOU CAN HAVE OTHER INMATES WHO ARE AS VICTIMS AS MUCH AS YOU OR I, ANOTHER INMATE WHO CAN BE ASSAULTED, ANOTHER INMATE WHO CAN BE ROBBED.

AND THAT WAS DEMONSTRATED TO YOU IN THE EVIDENCE.

IN FACT, SOME OF THE TESTIMONY DISCLOSED THAT THIS DEFENDANT, EVEN WHILE IN THE PRESENCE OF HIS GUARDS AND WHILE HANDCUFFED, STILL HAD THE CAPACITY TO STRIKE OUT AND ASSAULT BY MEANS OF KICKING ANOTHER INMATE.

THAT GIVES YOU SOME INSIGHT INTO THE TYPE OF PERSON THIS DEFENDANT IS.

IN ADDITION, IN THIS INCARCERATED SOCIETY, YOU SEE NOT ONLY INMATES CAN BE VICTIMS, BUT THE STAFF MEMBERS AT THE INSTITUTION CAN BE VICTIMS AS WELL.

AND THAT WAS EVIDENCED BY VIRTUE OF THE THREATS THAT WERE MADE, THE THREATS TO KILL BY THE DEFENDANT TO VARIOUS INDIVIDUALS WHOM YOU NOW KNOW THROUGH THE TESTIMONY.

SO NOT ONLY CAN HE ACTUALLY ASSAULT, HE CAN THREATEN TO KILL WHILE STILL IN CUSTODY.

THIRD ELEMENT, IT WAS DEMONSTRATED FOR YOU THROUGH THE TESTIMONY OF ONE OF THE WITNESSES, THAT ON ONE OCCASION THE DEFENDANT HAD IN HIS POSSESSION SOME RAZOR BLADES.

AND YOU RECALL THE DETAILS OF THAT. I DON'T HAVE TO BELABOR THAT POINT, AND AS TO HOW MANY [851] RAZOR BLADES HE'S SUPPOSED TO HAVE AND IN WHAT CONDITION.

THE POINT IS, I DON'T THINK IT TAKES ANY GREAT LEAP OF IMAGINATION TO CONTEMPLATE WHY THE DEFENDANT HAD THOSE RAZOR BLADES IN THAT CONDITION AND WHAT POTENTIAL FOR INJURY, IF NOT DEATH TO SOMEONE ELSE, THOSE BLADES REPRESENT.

IT'S AN INFERENCE, AND I'LL LEAVE IT AS TO THAT.

BUT THE POINT IS A RAZOR BLADE IN AN INCARCERATED SOCIETY CAN BECOME A DEADLY AND DANGEROUS WEAPON.

THESE THINGS EXIST IN THIS SOCIETY. IT'S A SEPARATE SOCIETY. IT'S SEPARATE AND APART FROM OUR OWN, AND YET AS WE KNOW FROM THE EVIDENCE, SHANKS CAN EXIST, MATCH BOMBS CAN EXIST, RAZOR BLADES. IT'S ALL PART OF THAT SOCIETY.

IT MAY NOT BE YOU OR I WHO IS VICTIMIZED, BUT IT CAN BE STAFF MEMBERS AND OTHER INMATES.

NOW, I'D LIKE YOU TO THINK ABOUT ONE OTHER THING WITH REGARD TO SOME OF THIS AGGRAVATING EVIDENCE THAT I PRESENTED TO YOU BY WAY OF THE YOUTH AUTHORITY REPRESENTATIVES.

YOU CAN INFER THAT THE DEFENDANT WENT TO THE YOUTH AUTHORITY CERTAINLY, AND YOU CAN INFER THAT HE GOT OUT, BECAUSE HE WAS IN A COMMISSION POSITION TO COMMIT THIS CRIME ON OCTOBER 6, 1986.

BUT LET'S THINK ABOUT WHAT THAT STAY IN [852] THE YOUTH AUTHORITY MEANT.

AGAIN, LET'S DIG A LITTLE BIT DEEPER INTO THE EVIDENCE AND REALIZE WHAT THAT MEANT.

AS ONE OF THE WITNESSES TESTIFIED, THE YOUTH AUTHORITY IS FOR THE PROTECTION OF SOCIETY AS WELL AS THE TREATMENT OF THE YOUTHS.

AS YOU HEARD FROM THE EVIDENCE, THERE ARE HOSPITALS OUT THERE. THERE ARE SCHOOLS, OPPORTUNITY TO LEARN A TRADE.

SO THIS DEFENDANT GETS OUT OF THE YOUTH AUTHORITY, AND BY INFERENCE, YOU CAN ANSWER THE FOLLOWING QUESTIONS YOURSELVES:

DID HE BENEFIT FROM THE YOUTH AUTHORITY?

DID HE LEARN HIS LESSON FROM THE YOUTH AUTHORITY?

DID HE BECOME A LAWABIDING CITIZEN?

AND YOU ALREADY KNOW THE ANSWERS TO THOSE QUESTIONS, AND YOU KNOW WHAT HE DID ON OCTOBER 6, 1986.

THAT WAS THE IMPACT THAT HAD.

AND WE CAN TAKE THAT EVEN A STEP FURTHER, BECAUSE THERE IS A CERTAIN DISRESPECT FOR THE LAW. THERE IS CERTAIN ANTI-SOCIAL BEHAVIOR HERE TO AN EXTREME DEGREE WHICH IS AT PLAY, AND THAT IS EVIDENCED BY WHAT HAPPENED IN THIS VERY COURTHOUSE ON AUGUST THE 3RD WHILE YOU JURORS WERE BEING SELECTED AND WHILE THIS DEFENDANT IS ON TRIAL FOR HIS LIFE.

AND WHAT DOES HE DO?

[853] WELL, YOU HAD THE TESTIMONY OF MR. CHATTERS. MR. CHATTERS MAY NOT HAVE BEEN THE MOST IMPRESSIVE INDIVIDUAL, BUT HE QUITE SIMPLY IN HIS OWN FASHION TOLD YOU WHAT HAPPENED TO HIM, AND IN SORT OF A GUTTURAL BRUTAL SENSE, HE WAS PUNCHED OUT AND ROBBED OF HIS MONEY RIGHT HERE IN THE COURTHOUSE, RIGHT HERE IN THE LOCK-UP, RIGHT HERE BEHIND JAIL BARS.

THAT'S WHAT THIS DEFENDANT DID, AND THAT SHOULD INDICATE SOMETHING TO YOU AS WELL ABOUT THE NATURE OF THIS DEFENDANT AND THE SUBJECT OF THE PENALTY THAT YOU DEEM APPROPRIATE.

I'D LIKE TO TURN FOR A MOMENT AWAY FROM THIS ASPECT OF THE AGGRAVATING EVIDENCE AND TURN TO THE OTHER ASPECT OF THE AGGRAVATING EVIDENCE THAT WAS PRESENTED TO YOU.

AS JUDGE BEAM WILL TELL YOU A LITTLE LATER THIS MORNING, YOU ARE TO CONSIDER IN DETERMINING THIS ISSUE OF LIFE WITHOUT PAROLE OR DEATH THE CIRCUMSTANCES OF THE CASE ITSELF.

AND I REALLY HAVE ONLY THIS POINT TO MAKE ABOUT THAT. I'M NOT GOING TO BELABOR WHAT HAPPENED IN THE BAR, BUT I'D LIKE TO MAYBE POINT OUT WHAT DID HAPPEN, AND THAT IS THIS:

THE EVENTS THAT OCCURRED IN THAT BAR AND THE EVENTS THAT YOU FOUND THE DEFENDANT GUILTY OF IN AND OF THEMSELVES SO SUBSTANTIALLY OUTWEIGH ANY OF THE MITIGATING EVIDENCE THAT WAS PRESENTED IN THIS CASE, THAT EVEN IF IT WERE JUST THOSE EVENTS ALONE, [854] THE DEATH PENALTY WOULD BE THE APPROPRIATE VERDICT.

AND WHY DO I SAY THIS?

THERE ARE CERTAIN OBVIOUS THINGS ABOUT WHAT HAPPENED IN THE BAR, BUT I WANT YOU TO THINK ABOUT THIS AS WELL.

I TOUCHED UPON IT IN MY GUILT PHASE ARGUMENT, BUT I THINK IT'S IMPORTANT TO IMPRESS UPON YOU ONCE AGAIN, AND THAT'S THIS:

FOUR PEOPLE WERE SHOT, AND YOU KNOW THE NATURE AND LOCATION OF ALL THE WOUNDS THAT EACH OF THOSE INDIVIDUALS SUFFERED.

AND QUITE FRANKLY, NOT THROUGH ANY ACTIONS OF THE DEFENDANT ALONE, IT IS JUST THROUGH SHEER GOOD LUCK, PROMPT MEDICAL ATTENTION, AND PERHAPS THE GRACE OF GOD THAT WE DON'T HAVE FOUR DEAD HUMAN BEINGS ON THE FLOOR OF THE WANDER INN BAR THAT NIGHT.

YOU HEARD THEM DESCRIBE THEIR WOUNDS.

IN MOST INSTANCES, WITH REGARD TO KELVIN WHIDDON, BRUCE MONROE, KEN BOONE, A MATTER OF MILLIMETERS IN DEVIATION OF THE PATH OF THE BULLET WOULD HAVE KILLED THEM.

THEY WERE THAT CLOSE TO DEATH, AND THE DEFENDANT IN THIS CASE WAS THAT CLOSE TO HAVING THE BLOOD OF FOUR HUMAN BEINGS ON HIS HANDS.

AND THAT IS SOMETHING YOU SHOULD CONSIDER AS AN AGGRAVATING CIRCUMSTANCE.

AS MUCH AS WHAT HAPPENED – WHAT ALMOST HAPPENED. WE WERE THAT CLOSE TO THAT SCENARIO WITH [855] FOUR DEAD BODIES, AND THAT QUITE SIMPLY, IS HORRENDOUS.

AND THAT'S WHY I SAY, BASED UPON THAT ALONE, THE AGGRAVATING EVIDENCE OF WHAT HAPPENED IN THAT BAR THAT NIGHT AND WHAT ALMOST HAPPENED SUBSTANTIALLY OUTWEIGHS

WHATEVER MITIGATING EVIDENCE WAS PRESENTED.

LADIES AND GENTLEMEN, I'M JUST ABOUT DONE. I'VE JUST ABOUT CONCLUDED MY REMARKS, AND THERE'S A COUPLE OF THINGS I'D LIKE TO SAY.

FIRST OF ALL, UNLIKE THE GUILT PHASE OF THIS CASE, I'M ONLY GOING TO SPEAK TO YOU ONCE TODAY.

THERE WILL BE NO REBUTTAL.

WHATEVER I HAVE TO SAY, I'M GOING TO SAY RIGHT NOW AND THAT'S IT.

SO YOU WILL NOT HEAR ME GET UP ONCE AGAIN TO ADDRESS YOU.

WITH RESPECT TO THIS KIND OF ISSUE, AGAIN, I FEEL ALREADY THE ANSWER TO SOME EXTENT IS ALREADY WITHIN YOU.

IT'S THE TYPE OF THING I'M SURE YOU HAVE THOUGHT ABOUT, AND I'M SURE YOU'RE READY TO DELIBERATE ABOUT TOGETHER, AND QUITE SIMPLY THERE'S NOT MUCH MORE I CAN SAY TO GIVE YOU ANY ADDED INSIGHT INTO HOW TO RESOLVE THE ISSUE.

THE SECOND THING I'D LIKE TO TALK ABOUT IS SOMETHING MR. SLICK I'M SURE WILL TALK ABOUT, AND THAT IS, LIFE WITHOUT POSSIBILITY OF PAROLE IS A BAD ENOUGH [856] PENALTY.

AND HE'S GOING TO SAY THAT TO YOU.

HE GOING TO SAY, I'M SURE, SOMETHING LIKE, LIFE WITHOUT POSSIBILITY OF PAROLE IS A HORRIBLE THING TO THINK ABOUT. YOU'RE GOING TO SPEND THE REST OF YOUR NATURAL DAYS IN A LITTLE EIGHT-BY-TEN CELL, SIX-BY-TEN, WHATEVER IT IS AT A PRISON, AND IN THAT CELL, THERE'S A TOILET, THERE'S KIND OF AN AWFUL LITTLE BED, MAYBE A SINK, MAYBE A MIRROR, AND NOT MUCH ELSE, AND THE DEFENDANT, PAUL TUILAEPA, WILL TURN 30 IN PRISON, 40, 50, WHO KNOWS AFTER THAT.

BUT THE REST OF HIS NATURAL DAYS WILL BE IN PRISON.

AND WITH REGARD TO THAT, I'D LIKE TO HAVE YOU TEMPER THAT THOUGHT WITH JUST A COUPLE OF THINGS.

FIRST OF ALL, THE CELL TO WHICH MELVIN WHIDDON IS NOW CONFINED IS A LOT SMALLER THAN THAT, AND THAT CELL IS UNDER THE GROUND, AND MELVIN WHIDDON IS NOT GOING TO HAVE THE BENEFIT OF LIVING OUT THE NATURAL DAYS. THE REST OF HIS NATURAL DAYS WERE TAKEN FROM HIM.

SO, WHEN I SAY LIFE WITHOUT POSSIBILITY OF PAROLE, IT'S A SERIOUS PENALTY, AND I GRANT YOU THAT, IT IS SERIOUS.

IT IS A VERY STIFF PENALTY, BUT IT IS NOT ENOUGH IN THIS CASE. IT IS NOT THE APPROPRIATE PENALTY.

AND BY APPLYING THE LAW AND THE EVIDENCE, [857] I THINK YOU TOO, WILL SEE IT SIMPLY IS NOT APPROPRIATE IN THIS PARTICULAR CASE.

BUT THERE IS MORE THAN THAT.

THERE IS ANOTHER THING I'D LIKE TO HAVE YOU THINK ABOUT WHEN MR. SLICK SAYS LIFE WITHOUT POSSIBILITY OF PAROLE IS BAD ENOUGH, IT'S SEVERE ENOUGH PENALTY.

I'D LIKE TO HAVE YOU ASK YOURSELVES THE QUESTION WHY DID THIS DEFENDANT SMILE JUST BEFORE HE SHOT KENNETH BOONE.

AN ODD PIECE OF EVIDENCE, SOMETHING THAT STUCK OUT IN MY MIND. I'M SURE IT HAD AN IMPACT ON YOURS AS WELL.

BUT I'D LIKE YOU TO THINK ABOUT THAT, BECAUSE AGAIN IT GIVES YOU A LITTLE BIT MORE INSIGHT TO HIM AND WHY LIFE WITHOUT POSSIBILITY OF PAROLE IS NOT ENOUGH IN THIS CASE.

AT THE POINT IN TIME PAUL TUILAEPA SMILED, JUST BEFORE HE BACKED OUT THE BACK DOOR OF THE WANDER INN BAR, HE HAD ALREADY SHOT DOWN THREE PEOPLE, AND YOU KNOW THE CIRCUMSTANCES OF HOW HE SHOT THEM DOWN.

AND AS HE STOOD THERE IN THE BACK OF THE BAR WITH THAT RIFLE IN HIS HANDS, KEN BOONE, AS YOU KNOW FROM THE DIAGRAM, WAS OFF TO HIS LEFT.

KEN BOONE POSED NO THREAT, HAD NO WEAPON, AND IF ANYTHING, WAS JUST TRYING TO

MELT INTO THE WOODWORK IN LIGHT OF WHAT HAPPENED.

AND YET TUILAEPA TURNS TO HIM, SMILES, AND [858] THEN SHOOTS HIM THROUGH THE NECK.

WHAT DOES THAT SMILE SIGNIFY?

DOES IT SIGNIFY REMORSE ON THE PART OF MR. TUILAEPA FOR WHAT HE HAD DONE IN SHOOTING THE OTHER THREE INDIVIDUALS?

DOES IT SIGNIFY THAT HE WAS SORRY FOR WHAT HE DID?

WHY SMILE? WHY DO THAT? WHY SHOOT KEN BOONE?

SO, THEN YOU THINK ABOUT SOME OF THESE THINGS THAT MR. SLICK WILL RAISE, THINK ABOUT THE SMILE, THE SMILE IN THIS CASE OF A KILLER.

QUITE LASTLY, WHEN YOU THINK ABOUT LIFE WITHOUT POSSIBILITY OF PAROLE, I WANT YOU TO BE MINDFUL, ONCE AGAIN, OF WHAT IT REPRESENTS.

THE DEFENDANT WILL NOT FALL OFF THE FACE OF THE EARTH. HE WILL BE OUT OF SIGHT PERHAPS EVEN OUT OF MIND. YOU CAN FORGET ABOUT HIM PERHAPS.

BUT HE STILL IS IN A SOCIETY. HE'S IN A DIFFERENT TYPE OF SOCIETY, AN INCARCERATED SOCIETY, A SOCIETY WHERE THE POPULATION RATHER THAN LAWABIDING CITIZENS ARE CRIMINALS AND INMATES, BUT A SOCIETY, NONETHELESS.

AND YOU KNOW FROM THE EVIDENCE HOW, IN THE PAST, THE DEFENDANT REACTED IN AN INCARCERATED SOCIETY.

PLEASE CONSIDER THAT AS YOU DELIBERATE AT THIS PHASE OF THE CASE.

[859] IN CLOSING, JUST A FEW LAST THINGS.

ONE IS PLEASE EXTEND TO MR. SLICK THE SAME COURTESY AND ATTENTIVENESS THAT YOU'VE EXTENDED TO ME THIS MORNING. I APPRECIATE THAT, AND I APPRECIATE THE SAME QUALITIES THAT YOU'VE EXHIBITED THROUGHOUT THE TRIAL.

IT HAS MOVED QUICKLY, PERHAPS INTENSELY, BUT JUST THE SAME, I THANK YOU FOR EXHIBITING THOSE QUALITIES.

SECONDLY, I WANT YOU TO THINK ABOUT YOUR OATH AS JURORS.

WHEN YOU RAISED YOUR HAND TO TAKE THAT OATH, IT AT THE TIME WAS SOMETHING YOU DID EN MASSE.

QUITE A FEW PEOPLE WERE HERE AT THE TIME YOU TOOK THAT OATH.

IT'S SOMETHING THAT CAN ALMOST BE DONE RATHER CAVALIERLY UNDER THE CIRCUMSTANCES. BUT NOW THAT YOU'RE HERE, NOW THAT WE'VE ALL BEEN BROUGHT TOGETHER TO THIS STAGE OF THE CASE, THE OATH TAKES ON MORE MEANING.

THE OATH REALLY MEANS SOMETHING NOW, AND IT MEANS YOU ARE GOING TO FOLLOW THE LAW THAT JUDGE BEAM GIVES YOU.

THERE MAY BE SOME THINGS YOU DON'T LIKE THE LAW, BUT THE LAW IS NOT WHAT YOU LIKE ABOUT THE LAW, BUT THE LAW IS WHAT YOU ARE DUTYBOUND TO FOLLOW.

SO, AS YOU CONSIDER THE CASE, BARE [sic] IN MIND THE OATH AND BARE [sic] IN MIND THE LAW WILL GUIDE [860] YOU.

YOU WILL NOT BE LOST IN THIS DELIBERATION PROCESS.

THE LAW WILL GUIDE YOU ALONG WITH THE EVIDENCE THAT HAS BEEN PRESENTED TO A JUSTIFIED AND APPROPRIATE VERDICT.

JUST ANOTHER THING OR TWO.

ONE THING IS, IN ADDITION TO TAKING THE OATH, IS THE FACT WHAT YOU AS JURORS REPRESENT.

WHEN YOU RENDER YOUR VERDICTS IN THIS CASE, YOUR VERDICTS WILL BE A REFLECTION OF YOUR OWN INDIVIDUAL AS WELL AS COLLECTIVE CONSCIENCES.

BUT IN A CASE LIKE THIS, YOU REPRESENT THE CONSCIENCES OF THE COMMUNITY AS WELL.

THE COMMUNITY CONSISTS OF THE PEOPLE WHO LIVE IN THE AREA, THE PEOPLE WHO LIVE IN THE COUNTY.

IT CONSISTS OF THE SURVIVING VICTIMS FROM THE WANDER INN BAR ROBBERY AND SHOOTING.

AND WHEN YOU RENDER A VERDICT IN THIS CASE, IT'S A VERDICT THAT REFLECTS NOT ONLY WHAT YOU FEEL, BUT A REFLECTION OF THE OUT RAGE OF THE COMMUNITY AS TO THESE TYPES OF ACTIONS AS WELL.

SO THAT IS SOMETHING THAT SHOULD FACTOR IN AS WELL.

AND THEN LASTLY, I'M SIMPLY GOING TO ASK OF YOU TO HAVE THAT MORAL COURAGE TO DO WHAT IS RIGHT.

WE WILL ABIDE BY YOUR DECISION. YOU AGAIN AS THE CONSCIOUS OF THE COMMUNITY WILL MAKE THAT [861] DECISION AND WE WILL ABIDE BY IT, THE COURT, MYSELF, THE COMMUNITY.

BUT SIMPLY HAVE THE MORAL COURAGE TO TAKE A STAND AND TO DO WHAT IS RIGHT IN THIS CASE.

AND I SUBMIT TO YOU WHAT IS RIGHT IS THIS, THAT YOU SHOULD FIND THAT THE AGGRAVATING EVIDENCE THAT HAS BEEN PRESENTED TO YOU DOES IN FACT SUBSTANTIALLY OUTWEIGH THE MITIGATING EVIDENCE, THAT QUITE FRANKLY NOT MUCH CAN BE SAID THAT IS GOOD ABOUT THIS DEFENDANT, IF ANYTHING AT ALL, AND I SUBMIT TO YOU THAT THE EVIDENCE REALLY REVEALS NOTHING REDEEMING ABOUT HIM WHATSOEVER.

IN LIGHT OF THAT AND ACCORDINGLY, YOU SHOULD FIND THE RIGHT VERDICT TO BE THE VERDICT OF DEATH AS TO THIS DEFENDANT IN THIS CASE.

THANK YOU VERY MUCH.

THE COURT: MR. SLICK.

MR. SLICK: THANK YOU, YOUR HONOR.

DEFENSE PENALTY ARGUMENT (VOL 14, P. 861)

ARGUMENT

BY MR. SLICK:

YOUR HONOR, MR. HODGMAN, LADIES AND GENTLEMEN.

AS I STAND HERE NOW, YOU HAVE FOUND PAUL TUILAEPA GUILTY OF MURDER, AND YOU HAVE FOUND THE SPECIAL CIRCUMSTANCES TRUE.

AND IN PARTICULAR, YOU HAD TO, BUT IN PARTICULAR YOU FOUND IT TRUE THAT HE INTENDED TO KILL [862] THE PERSON THAT HE KILLED.

I TRUST IN YOUR DECISION, AND YOU WERE OUT LONG ENOUGH TO DO IT, TO GIVE ME AND TO TREAT ME FAIRLY, AND I TRUST YOU DID.

I TRUST THAT YOU GAVE ME THAT FAIR DECISION.

AND IT WAS A CARING – I HOPE FOR MYSELF AND FOR YOU, IT WAS A CARING – AND I THINK IT WAS – A CARING AND THOUGHTFUL DECISION.

YOU REJECTED WHAT I HAD TO SAY ABOUT THE INTENT TO KILL.

OBVIOUSLY YOU DID, OR WE WOULDN'T BE HERE.

IN PRESENTING ARGUMENTS LIKE I DID EARLIER AND LIKE MR. HODGMAN DID NOW AND WHAT I'M GOING TO SAY AS I GO ALONG, ARGUMENTS ARE REALLY IN THIS STAGE OF THE TRIAL – ARE REALLY NOTHING MORE THAN GIVING ADVICE, AND I'M GOING TO TAKE ADVANTAGE OF IT.

WE BOTH HAVE THE OPPORTUNITY TO GIVE YOU ADVICE, BUT AS SUCH, IT OUGHT TO BE CONSIDERED THAT.

AND YOU – IT'S YOUR DECISION. YOU ARE THE ONES THAT TAKE THAT ADVICE AND DO WITH IT WHAT YOU MAY, ACCEPT IT, REJECT IT.

I HOPE THAT YOU THINK ABOUT WHAT BOTH OF US HAVE TO SAY AND THINK OF IT AS JUST ADVICE AND THEN ACT ACCORDINGLY.

YOU'VE DONE IT. YOU'VE TREATED ME THAT WAY, AND THAT'S APPROPRIATE.

[863] I'M GOING TO TALK A LITTLE MORE ABOUT THAT INTENT TO KILL ELEMENT AS WE GET INTO THAT, BUT CONSIDER WHAT I'M SAYING AS ADVICE.

I'M GOING TO TALK ABOUT SOME THINGS THAT – AND MR. HODGMAN TALKED ABOUT SOME THINGS THAT MAYBE CREEP INTO YOUR MINDS LATER.

AND I'M GOING TO TALK ABOUT SOME THINGS THAT MIGHT CREEP IN YOUR MINDS IF YOU VOTE

FOR THE DEATH PENALTY, IF YOU COME BACK WITH A VERDICT OF DEATH.

NEXT WEEK OR TOMORROW OR A YEAR FROM NOW, YOU MAY HAVE CERTAIN THINGS ENTER IN YOUR MINDS, AND I THINK YOU OUGHT TO THINK ABOUT THOSE THINGS NOW.

THE REASON FOR THAT IS, IF YOU TAKE THE TIME TO PREPARE, PREPARE NOW FOR A WORRY OR A SECOND THOUGHT THAT YOU MAY HAVE LATER ON, I THINK WHAT THAT DOES IS IT MAKES YOU – IT FORCES YOU AND IT IS A TOOL FOR YOU TO HAVE A MORE CAREFUL AND THOUGHTFUL DECISION.

WHAT YOU HAVE TO DECIDE RIGHT NOW, OF COURSE, IS WHETHER MR. TUILAEPA SHOULD BE PUT TO DEATH FOR THIS CRIME.

ONE OF THE GREAT TENDENCIES, I THINK, IS THE TENDENCY TO HAVE BEEN THINKING ABOUT THAT ALL ALONG, AND MAYBE YOU'VE DECIDED ALREADY ALL ALONG.

WELL, IF YOU HAVE AND YOU HAVE BEEN – THINKING ABOUT IT IS A NATURAL TENDENCY, AND BRINGING YOURSELF TO A CONCLUSION IS A NATURAL TENDENCY.

[864] I'M GOING TO ASK YOU TO REJECT THAT, BECAUSE I DON'T THINK THAT IS BEING COMPLETELY FAIR, AND IN FACT – I MEAN MAKING YOUR DECISION BASED ON WHAT YOU'VE THOUGHT ABOUT SO FAR.

I ASK YOU TO THINK ABOUT IT AGAIN, THINK ABOUT IT ANEW AND THEN MAKE YOUR DECISION ACCORDINGLY.

IN ORDER TO RETURN A VERDICT OF DEATH, YOU – EACH OF YOU MUST BE PERSUADED THAT THE CIRCUMSTANCES IN AGGRAVATION SO OUTWEIGH THE CIRCUMSTANCES IN MITIGATION AS TO WARRANT THE DEATH PENALTY.

THAT'S THE LAW PRETTY MUCH VERBATIM WHAT HIS HONOR IS GOING TO TELL YOU.

THAT'S WHAT YOU'VE GOT TO DO.

NOW, THERE'S TWO KEY ELEMENTS TO THAT.

ONE IS THAT THE AGGRAVATING CIRCUMSTANCES MUST SO SUBSTANTIALLY OUTWEIGH THE MITIGATING CIRCUMSTANCES IN ORDER TO RENDER A VERDICT OF DEATH.

BUT THE OTHER ELEMENT AND EQUALLY IMPORTANT – AND I THINK MAYBE YOU'VE ALREADY THOUGHT ABOUT IT THIS WAY – IS THE WORDS, EACH ONE OF YOU.

IT'S A TYPE OF DECISION THAT EACH ONE OF YOU SHOULD CONSIDER, AND I HOPE YOU DO, THAT IT'S YOUR DECISION BY YOURSELF.

YOU SHOULD THINK THIS DECISION, WHATEVER IT IS GOING TO BE, AS YOUR PERSONAL DECISION BY YOURSELF WITHOUT HELP FROM ANYONE AND WITHOUT SUPPORT FROM ANYONE.

[865] I SAY THAT WITH THIS EXCEPTION OR TO THIS EXTENT.

YOU'RE GOING TO DELIBERATE.

YOU'RE GOING TO GET A CHANCE TO TELL YOUR VIEWS TO YOUR FELLOW JURORS.

YOUR FELLOW JURORS ARE GOING TO GET A CHANCE TO TELL THEIR VIEWS TO YOU.

YOU'VE ALREADY DONE IT. YOU'VE ALREADY EXPERIENCED THAT PROCESS AND YOU KNOW EACH OTHER PRETTY WELL IN THAT PROCESS.

BUT THAT'S NOT GOOD ENOUGH.

WHEN YOU MAKE THE DECISION, WHEN YOU ULTIMATELY SAY YES OR NO, WHEN YOU WRITE THAT DECISION DOWN – WELL, THE FOREMAN WRITES IT DOWN.

WHEN YOU ULTIMATELY GIVE THAT FINAL VOTE, THOUGH, IT'S YOUR DECISION AND IT'S YOURS ALONE AND NOBODY ELSE'S.

THAT'S THE LAW. THAT'S WHAT I'M ENTITLED TO AND THAT'S WHAT'S RIGHT.

I THINK – WELL, YOU CAN'T TAKE COMFORT IN THE FACT THAT IT'S ONE OF 12. IT'S NOT ONE OF 12. IT'S NOT A GROUP DECISION.

ULTIMATELY ASSIGNED AS A GROUP, BUT IT'S 12 INDIVIDUAL DECISIONS.

IF I MAY BE PERMITTED TO SHOW AN EXAMPLE.

IT IS AS IF IT WAS THE SAME GROUP OF 12 OR YOU DECIDING ON AN UNLAWFUL KILLING.

YOU'RE GOING TO DECIDE ON A LAWFUL [866] KILLING.

BUT IF YOU WERE DECIDING ON AN UNLAWFUL KILLING, YOU VOTED FOR DEATH, AND THE PENALTY WAS CARRIED OUT, THEN YOU HAD TO ANSWER FOR IT LATER – IN THIS CASE, OBVIOUSLY YOU DON'T HAVE TO ANSWER FOR IT LATER, BECAUSE YOU'RE THE LAW.

BUT IN THIS EXAMPLE YOU HAVE TO ANSWER FOR IT LATER.

EACH ONE OF YOU, BY YOURSELF, WOULD BE PERSONALLY RESPONSIBLE, IF YOU ADOPT THE LAWS OF AIDING AND ABETTING AND THE LIKE.

I THINK YOU SHOULD VIEW IT THAT WAY, BECAUSE IT IS IMPORTANT.

WHEN YOU HAVE TO THINK ABOUT THE DECISION LATER, SHOULD YOU THINK ABOUT IT LATER, YOU'RE GOING TO BE BY YOURSELF WHEN YOU THINK ABOUT IT, AND YOU'RE NOT GOING TO HAVE THE OTHER 12 TO TALK ABOUT IT WHEN DID I MAKE THE RIGHT DECISION.

WHEN YOU ULTIMATELY DECIDE, THINK ABOUT IT AS YOUR PERSONAL DECISION.

I WANT TO TALK ABOUT LIFE WITHOUT THE POSSIBILITY OF PAROLE.

I'M GOING TO CITE AN EXAMPLE, AND THEN GO ON AND GIVE A BRIEF HISTORY AS TO HOW WE AS A SOCIETY HAVE GOTTEN WHERE WE ARE NOW.

AND I SAY THIS, AND I START OFF, AND I SAY THIS WITH THE UTMOST RESPECT I HAVE WITH YOU FOLKS – OR FOR YOU FOLKS.

[867] JUST LISTEN TO ME FOR WHAT IT'S WORTH.

THE FIRST MURDER, FIRST RECORDED MURDER, FIRST MURDER ON THIS EARTH IS RECORDED IN THE BIBLE, AND IT'S RECORDED IN THE BOOK OF GENESIS, AND YOU'RE PROBABLY ALL FAMILIAR WITH IT, IT'S WHERE CANE KILLED HIS BROTHER ABEL. FLAT KILLED HIM OUT OF JEALOUSY AND NO OTHER REASON, FLAT COLD-BLOODED MURDER AT THE END.

HE GOT PUNISHED FOR THAT AND HE GOT IN EFFECT LIFE WITHOUT POSSIBILITY OF PAROLE.

HE WAS BANISHED, ORDERED NEVER TO RETURN. COULD HAVE GOTTEN THE DEATH PENALTY. THERE WOULD HAVE BEEN NO PROBLEM AT ALL FOR HIM TO GET THE DEATH PENALTY, BUT HE DIDN'T.

I CITE THIS JUST TO SHOW YOU MY FEELINGS AND HOPEFULLY YOUR FEELINGS THAT LIFE WITHOUT THE POSSIBILITY OF PAROLE IS A VALID PUNISHMENT.

IT'S NOT SOMETHING THAT YOU SHOULD THINK OF AS SOMEBODY'S GETTING A BREAK OR THEY'RE NOT GETTING A BREAK.

IT'S A VALID PROPER PUNISHMENT, AND IT'S PROPER UNDER THE LAW, AND WE'LL TALK A LITTLE MORE ABOUT THAT AS WE GO.

IN OUR HISTORY, THOUGH, AFTER THAT FIRST MURDER, SOMETIME THEREAFTER, HUMAN BEINGS TOOK OVER THE BUSINESS OF PUNISHMENT, AND

FOR A LONG TIME, ALMOST EVERYTHING WAS PUNISHABLE BY DEATH.

AT ONE POINT IN TIME, IT WAS CRUCIFICATIONS.

[868] IF WE BRING IT UP CLOSER TO OUR TIME, WHICH IS MORE SIGNIFICANT TO US AS A PEOPLE, ABOUT EIGHT HUNDRED YEARS AGO, IN ENGLAND, WHERE OUR SOCIETY WAS REALLY DEVELOPED FROM, THE ROOTS OF OUR SOCIETY STARTED IN ENGLAND WAY BACK THEN, THEY PUNISHED FOR DEATH FOR ALMOST EVERYTHING, BURGLARIES, ROBBERIES, RAPES, THOSE KINDS OF THINGS WERE PUNISHABLE BY DEATH.

MOVING ON UP A HUNDRED YEARS AGO IN THE WEST, STILL A LOT OF CRIMES WERE PUNISHABLE BY DEATH OTHER THAN MURDER.

ONE OF THE COMMON THREADS THAT GO THROUGH THAT AND PERHAPS ONE OF THE REASONS WHY SO MANY CRIMES ARE PUNISHABLE BY DEATH – THERE'S NO SUCH THING AS LIFE WITHOUT THE POSSIBILITY OF PAROLE. THAT DIDN'T EXIST.

AND THE REASON WHY IT DIDN'T EXIST IS NO PRISONS.

YOU THINK ABOUT IT, BACK IN THOSE DAYS, YOU COULDN'T GIVE SOMEBODY LIFE WITHOUT POSSIBILITY OF PAROLE, BECAUSE IT DIDN'T EXIST.

THEY WOULD BE OUT OR SOMETHING WOULD HAPPEN.

SO IT WAS IMPOSSIBLE.

GOING UP THROUGH OUR SOCIETY – WELL, TODAY THAT DOES EXIST. WE DO HAVE PRISONS AND WE DO HAVE LIFE WITHOUT POSSIBILITY OF PAROLE.

GOING UP THOUGH OUR SOCIETY, THERE WAS A POINT OF TIME WHERE HERE, IN CALIFORNIA, WE DIDN'T [869] HAVE THE DEATH PENALTY.

THE COURT THREW IT OUT, AND THERE WAS SOME PERIOD OF TIME WHERE WE JUST HAD LIFE SENTENCES.

DIDN'T EXIST.

THEN, PEOPLE GOT LIFE SENTENCES. THEY CAME UP FOR PAROLE. IF YOU GOT SENTENCED FOR LIFE DURING THAT PERIOD OF TIME OR ANY TIME BEFORE AND UP TO THAT PERIOD OF TIME, OR IF YOU WENT ON TRIAL FOR THE DEATH PENALTY AND THE JURY SAYS LIFE, WHAT YOU GOT WAS, IN EFFECT, SEVEN YEARS FOR LIFE, BECAUSE AT THAT TIME EVERYBODY CAME UP FOR PAROLE AFTER SEVEN YEARS.

SO, YOU GO ON A DEATH PENALTY TRIAL LIKE YOU FOLKS HAVE, YOU RULE ON LIFE INSTEAD OF DEATH, SEVEN YEARS LATER THE GUY IS KNOCKING ON THE PAROLE DOORS, I'D LIKE TO GET OUT NOW.

WELL, THEY DIDN'T GET OUT THAT FAST. I'M NOT SAYING THEY DID. IN FACT, SOME OF THEM WOULD NEVER EVER EVER GET OUT NO MATTER WHAT ANY WAY.

THE SOCIETY DOES CONTROL THAT, BUT THE FACT IS THAT REMAINS.

IT'S WORTH TALKING ABOUT, AND THE REASON AND THE ONLY REASON I BRING THIS UP IS JUST TO DEMONSTRATE THE BEST I CAN THAT LIFE WITHOUT POSSIBILITY OF PAROLE MEANS LIFE WITHOUT POSSIBILITY OF PAROLE.

YOU DON'T GET OUT. YOU SIT THERE AND YOU SIT THERE AND YOU SIT THERE.

THERE ARE CROOKS IN JAIL THAT PROBABLY [870] SHOULD SIT THERE AND PROBABLY WILL, BUT THEY DO COME UP FOR PAROLE FROM TIME TO TIME, EVERY YEAR, EVERY TWO YEARS, DEPENDING ON THE SITUATION. THIS MAN WON'T COME UP FOR PAROLE.

WHEN YOU'RE DECIDING LIFE OR DEATH, IT'S NOT JUST LIFE THAT HE'S GOING TO GET OUT. IT'S NOT THAT.

PLEASE THINK ABOUT IT AS LIFE WITHOUT THE POSSIBILITY OF PAROLE. THEY ARE YOUR OPTIONS.

AGAIN, YOU MUST BE PERSUADED THAT THE AGGRAVATING CIRCUMSTANCES ARE SO SUBSTANTIAL IN NATURE, ARE SO SUBSTANTIAL IN COMPARISON WITH THE MITIGATING CIRCUMSTANCES.

THERE ARE FIVE FACTORS, ONLY FIVE.

THE JUDGE IS GOING TELL YOU THE OF FIVE FACTORS THAT YOU HAVE TO CONSIDER. AND HE'S GOING TO TELL YOU, YOU ARE FREE TO ASSIGN WHATEVER MORAL OR SIMPATHETIC [sic] VALUE

YOU WANT TO EACH OF THESE FACTORS OR ALL OF THEM.

BELIEVE ME, YOU'VE GOT JUST AN ENORMOUS AMOUNT OF DISCRETION.

I'M GOING TO GIVE YOU THE FIVE FACTORS, BUT HE'S GOING TO TURN YOU LOOSE TO ASSIGN A VALUE THAT YOU DEEM APPROPRIATE ON ALL FIVE.

YOU CAN –

IT'S NOT – YOU DON'T WEIGH THEM TWO TO ONE – I MEAN TWO TO THREE, OR FOUR TO ONE, THAT KIND OF THING. THAT'S NOT THE WAY IT IS.

[871] ANY ONE OF THOSE FACTORS ALL BY THEMSELVES, IF YOU FIND IN MITIGATION – ANY ONE OF THEM IS ENOUGH FOR A LIFE SENTENCE, ANY ONE.

THE POINT IS, YOU JUST HAVE SUCH A WIDE DISCRETION. THE FIELD IS WIDE OPEN.

I WANT TO TALK ABOUT THE FIVE FACTORS, EACH ONE OF THEM.

THE FIRST ONE, AND OBVIOUSLY THE MOST GLARING AND THE ONE YOU CAN'T ESCAPE IS WHAT BRINGS US HERE IN THE FIRST PLACE, THE WANDER INN MURDER. THAT'S WHY YOU'RE HERE. YOU CAN'T – YOU JUST CAN'T ESCAPE THAT WHAT I WANT YOU – I HOPE YOU TO DO – ZERO IN ON – AGAIN I'M GOING TO TALK ABOUT THOSE SHORT SECONDS IN TIME FROM THE TIME OF THE KNOCK DOWN –

NOW, I'M NOT BLAMING THIS FELLOW WHO GOT SHOT. I'M NOT BLAMING HIM ONE BIT. IT'S NOT HIS FAULT. I DON'T MEAN THAT AT ALL.

IT'S NOT WHY – IT'S JUST NOT WHY I'M HERE. PERIOD. IT'S NOT A FAIR THING TO TALK ABOUT. IT'S NOT HIS FAULT.

BUT UP UNTIL THAT POINT, THERE WASN'T GOING TO BE A MURDER.

AND YOU'RE NOT JUDGING THE MAN WHO GOT KNOCKED DOWN TO THE GROUND SAYING IT'S HIS FAULT IF YOU COME BACK WITH A LIFE VERDICT, YOU'RE NOT SAYING THAT AT ALL.

BUT THAT'S WHAT STARTS IT, AND WHAT STARTS [872] IT, YOU HAVE TO INTO MR. TUILAEPA'S MIND.

YOU DON'T LOOK INTO HIS MIND WHAT STARTS IT, BUT THAT IS WHAT STARTS IT.

I KNOW HE CAME THERE WITH A GUN, AND I KNOW HE CAME THERE PREPARED. I MEAN IT'S OBVIOUS, HOPING MAYBE YOU DON'T HAVE TO USE IT, HOPING THAT THIS THING IS GOING TO GO OKAY, BUT IT DOESN'T.

YEAH, I KNOW HE COULD HAVE SHOT INTO THE CEILING OR THE FLOOR AND REALLY ALL OF THAT IS TRUE.

BUT YOU STILL HAVE TO THINK, WHEN YOU'RE DECIDING WHAT TO DO WITH HIM AND YOU'RE DECIDING HOW AGGRAVATING THIS PARTICULAR CIRCUMSTANCE IS, TO GIVE ANY MEANING TO

THAT SECTION AT ALL, YOU HAVE TO LOOK – AND I HOPE YOU DO – INTO HIS MIND, THE THOUGHT PROCESS, THE AMOUNT HE THOUGHT ABOUT IT.

AND YES, PERHAPS YOU SHOULD THINK ABOUT HIS PROCESS FROM THE MOMENT HE HAS KNOWLEDGE OF THE FIGHT TO THE END OF THE BAR UNTIL HE LEAVES.

HE FIRES ONE SHOT, AND YOU CAN'T FORGET ABOUT THE OTHER THREE. YOU SHOULD CONSIDER THE WHOLE THING.

WHAT I'M ASKING YOU TO DO IS REMEMBER THAT YOU'RE GOING TO BE CONSIDERATE IN DECIDING WHETHER HE LIVES OR DIES BASED ON THOSE HANDFULL [sic] OF SECONDS, BECAUSE THAT'S WHEN THE DEED OR THAT'S WHEN THE INTENT WAS FORMED TO DO WHAT WAS DONE.

THE LAW RECOGNIZES DIFFERENT DEGREES OF THOUGHT PROCESS, DIFFERENT DEGREES OF REFLECTION, A [873] SIMPLE INTENT TO KILL OR SOMETHING STRONGER THAN A SIMPLE INTENT TO KILL.

YOU JUST TRIED A MURDER CASE AND YOU DECIDED ON A MURDER CASE THAT ALL THAT WAS REQUIRED – AS A MATTER OF FACT, WE JUST TALKED ABOUT THE MURDER, YOU DON'T EVEN HAVE TO WORRY ABOUT INTENT TO KILL. AN INTENT TO KILL IS NOT EVEN REQUIRED.

ALL YOU TO HAVE DO IS FIND THAT A KILLING OCCURRED DURING A ROBBERY.

THE ROBBERY SUPPLIES, THE EVIL, THE EVIL INTENT WHICH RAISES THIS THING TO A FIRST DEGREE MURDER. THAT'S HOW YOU GET – BUT THE LAW DOES RECOGNIZE IN OTHER TYPE OF KILLINGS, THAT INTENT TO KILL IS NOT FIRST DEGREE MURDER.

JUST BECAUSE – I HATE TO SAY JUST BECAUSE, BECAUSE THAT'S A SERIOUS THING, AND I DON'T MEAN TO LIGHTEN AT ALL.

BUT IF YOU HAVE AN INTENT TO KILL AND THERE IS IS [sic] A KILLING, THAT DOESN'T MEAN THERE'S A FIRST DEGREE MURDER.

THERE'S ANOTHER ELEMENT, AND THE LAW RECOGNIZES A MORE CAREFUL THOUGHT PROCESS, AND THAT THOUGHT PROCESS TO DELIBERATE AND PREMEDITATE.

A KILLING IS JUST AN INTENT TO KILL WITHOUT A ROBBERY OR WITHOUT CERTAIN SPECIAL THINGS WE DON'T HAVE TO TALK ABOUT NOW TO MAKE MY POINT.

KILLING WITH THE INTENT TO KILL, AND IT IS NOT FIRST DEGREE MURDER, PREMEDITATED IS A WAY TO GET [874] THE FIRST DEGREE MURDER.

AND I JUST WANT TO SHOW YOU HOW THE LAW DOES RECOGNIZE DIFFERENT THOUGHT PROCESSES AND DIFFERENT DEGREES OF REFLECTION ON SOMEBODY WHO COMMITS A MURDER.

TO CONSTITUTE A DELIBERATE AND PREMEDITATED KILLING, THE JUROR MUST WEIGH AND CONSIDER THE QUESTION OF KILLING AND THE

REASONS FOR AND AGAINST SUCH A CHOICE HAVING IN MIND THE CONSEQUENCES, HE DOES DECIDE TO AND DOES KILL.

SEE THE DIFFERENCE?

NOW, FORGET THE ROBBERY AGAIN, BUT IF SOMEONE INTENDS TO KILL SOMEBODY, IT'S NOT PUNISHABLE BY DEATH, IT'S NOT FIRST DEGREE MURDER.

IT'S ONLY FIRST DEGREE MURDER WHEN THERE'S A FURTHER THOUGHT PROCESS.

AS A MATTER OF FACT, AT ONE TIME, THE LAW DID REQUIRE THIS PROCESS IN ORDER TO HAVE A DEATH PENALTY IN THE FIRST PLACE.

IN ORDER TO HAVE SOMEONE EVEN CONSIDER – A JURY TO CONSIDER THE DEATH PENALTY, THIS THOUGHT PROCESS WAS REQUIRED.

IT'S NOT REQUIRED NOW, BUT I'M ASKING YOU TO THINK ABOUT IT, BECAUSE THAT'S THE ONLY THING THAT ADDS MEANING TO THE CIRCUMSTANCES OF THE CRIME.

OTHERWISE, WHAT'S THERE TO TALK ABOUT?

YOU HAVE TO TALK ABOUT THE CIRCUMSTANCES, THE DETAILS OF THE CRIME, AND IT'S NOT A DELIBERATE [875] AND PREMEDITATED KILLING.

IT'S OBVIOUS THAT THERE WAS NO WEIGHING AND CONSIDERATION OF THE CIRCUMSTANCES AND THE CONSEQUENCES OF THE ACT.

THAT'S A LEGITIMATE THING TO CONSIDER AND YOU SHOULD CONSIDER IT.

IN FACT, I THINK THAT'S REALLY FOR THOUGHT, HIGHLY IMPORTANT.

A SHORT PERIOD OF TIME. THERE'S THAT SHORT THOUGHT PROCESS, AND I'M OBVIOUSLY POSITIONED – I'M SUGGESTING TO YOU THAT THAT SHORT THOUGHT PROCESS DOES NOT RAISE ITSELF TO THE PREMEDITATED AND DELIBERATED THOUGHTFUL WEIGHING OF THE CONSEQUENCES KILLING, AND I SUGGEST TO YOU THAT THAT IS ENOUGH ALL BY ITSELF TO FIND THAT LESS THAN AN AGGRAVATING CIRCUMSTANCE, AND THAT'S ENOUGH FOR YOU TO DECIDE WITHOUT ANYTHING ELSE THAT THIS SHOULD BE A LIFE SENTENCE WITHOUT THE POSSIBILITY OF PAROLE.

YES, IT COULD HAVE BEEN FOUR INSTEAD OF ONE, BUT FOR THE GRACE OF GOD IT COULD HAVE BEEN FOUR, BUT FOR THE GRACE OF GOD IT COULD HAVE BEEN NONE.

YOU CAN'T THINK OF WHAT YOU'RE NOT GOING TO PUNISH FOR WHAT COULD HAVE BEEN, YOU'RE GOING TO PUNISH FOR WHAT WAS AND WHAT IS AND THE THOUGHT PROCESS OF MR. TUILAEPA.

THE NEXT FACTOR, I'LL JUST GO RIGHT DOWN THE SAME ORDER THAT THE COURT'S GOING TO GIVE IT TO YOU.

[876] THE NEXT FACTOR IS PAST ACTS OF VIOLENCE, CRIMINAL ACTS OF VIOLENCE.

WELL, I HEARD THEM, TOO, AND BOY, IT SEEMS TO ME THAT, LOOK AT THIS WHOLE PICTURE, THAT'S PRETTY INSIGNIFICANT.

I WOULDN'T WANT TO BE ROBBED, AND I WOULDN'T WANT TO HAVE SOMEBODY SAY BAD WORDS TO ME OR THREATEN ME IN ANY WAY.

WHEN THE THREATS WERE MADE –

ONE OF THE THINGS THAT I SUPPOSE IS A LITTLE DISTURBING, AND THAT IS, MAYBE THE DEGRADING COMMENTS TO THE WOMEN, AND I THINK IT'S A FAIR THING TO WEIGH THE DEGRADING COMMENTS TO WOMEN AS FAR AS THE DEGRADATION OF THE WOMEN WATCHING THE MEN TAKE SHOWERS.

IT'S THE SAME WOMEN, SAME PEOPLE.

I'M NOT SAYING IT'S THEIR FAULT WHEN THEY GET A BAD COMMENT AND IT'S NOT THEIR FAULT AT ALL BECAUSE THE SYSTEM DICTATES THIS.

BUT BY GOLLY, IT, IN A WAY, INVITES BAD COMMENTS, IT REALLY DOES, WHEN YOU HAVE WOMEN SUPERVISEING [sic]—YEAH, THEY'VE GOT TO MAINTAIN EYE CONTACT THAT KIND OF THING I THINK IS TERRIBLE.

AND IT DOES INVITE LOW-GRADE, DISTASTEFUL COMMENTS.

BUT THAT ASIDE, LOOKING AT THE WHOLE THING, I DON'T THINK YOU WILL FEEL RIGHT ABOUT YOURSELVES IF YOU DECIDE THIS CASE BASED ON THAT KIND [877] OF CONDUCT.

I SUGGEST TO YOU THAT THAT'S NOT SIGNIFICANT ENOUGH, WHEN YOU START TALKING ABOUT SUBSTANTIAL COMPARISON – THAT'S NOT SIGNIFICANT ENOUGH TO THINK ABOUT TO TAKE AWAY FROM WHAT WE TALKED ABOUT EARLIER.

THIRD ITEM, PRIOR FELONY CONVICTIONS. THERE ARE NONE.

THAT'S A CIRCUMSTANCE THAT YOU CAN CONSIDER AND YOU CAN CONSIDER THAT ALONG WITH HIS AGE, 21 YEARS OLD, MAYBE TOO YOUNG TO HAVE A STRING OF FELONIES, MAYBE.

BUT HE DOESN'T HAVE ANY FELONIES, AND YOU SHOULD CONSIDER THAT THE ONLY THING HE'S GOT THAT YOU CAN CONSIDER IS WHAT YOU'VE BEEN TOLD ABOUT, AGE.

YEAH, HE'S OLD ENOUGH, 16-YEAR OLD IS OLD ENOUGH.

BY THE WAY, WHEN WE TALK ABOUT AGE AND YOU TALK ABOUT AGE IN COMPARISON OF SOME OF THESE THREATS, SOME OF THE THREATS TO THE WOMEN, BACK UP HE'S 15, 15, 17 YEARS OLD, HE'S REALLY A YOUNGSTER MAKING THESE KIND OF THREATS, THESE KIND OF BAD COMMENTS.

BUT ANYWAY, AGE.

YEAH, HE'S OLD ENOUGH TO MAKE A DECISION.

OBVIOUSLY ARE YOU OLD ENOUGH AT 14, 15, 16, 30?

THAT'S NOT THE LAW.

THE LAW IS AGE, PERIOD, NOT WHETHER YOU'RE [878] OLD ENOUGH, BUT AGE.

HE'S A YOUNG MAN AND YOU SHOULD CONSIDER THAT.

YEAH, HE'S MATURE ENOUGH TO MAKE A DECISION.

DOESN'T HAVE A VERY HIGH IQ, CAN'T THINK THINGS THROUGH VERY WELL OR DOESN'T, BUT, YEAH, HIS AGE IS A MITIGATING FACTOR, AND THAT'S ENOUGH OF A MITIGATING FACTOR TO CONSIDER.

FINALLY, THE FIFTH ITEM – YOU KNOW, YOU TALK ABOUT FIVE SEPARATE ITEMS, AND THEN YOU GET TO ITEM NUMBER FIVE, AND ITEM NUMBER FIVE IN EFFECT SAYS EVERYTHING. IT REALLY DOES. IT'S ALL OF THE ABOVE. IT'S EVERYTHING. IT'S WHATEVER SIMPATHETIC [sic] OR MORAL VALUE YOU WANT TO PLACE ON IT.

ANY SYMPATHY YOU WANT TO GIVE MR. TUILAEPA OR HIS FAMILY.

YOU HEARD ABOUT HIS IQ, YOU HEARD ABOUT HIS PROBLEMS.

DO WITH IT WHAT YOU MAY.

I THINK THAT'S ENOUGH, BUT IT'S EASIER FOR ME. I'M THE ONE JUST GIVING THE ADVICE.

I SPEND A LOT OF TIME, AS MR. HODGMAN DOES AND AS HE DID – I TOO HAVE A LOT OF CONCERN ON THESE KINDS OF CASES.

I SWEAT BULLETS.

I SWEAT ABOUT SELECTING A JURY IN THE FIRST PLACE.

[879] AND I SWEAT ABOUT HOW THE EVIDENCE IS GOING TO COME IN.

I'M SWEATING NOW WHAT IN THE WORLD AM I GOING TO SAY AND THAT KIND OF THING.

I WORRY MORE IN THESE KIND OF CASES THAN ANY OTHER KIND. THEY'RE THAT SERIOUS.

WHEN I COME DOWN TO IT, I DON'T HAVE TO MAKE THE DECISION.

YOU FOLKS ARE THE ONE AND YOU REALLY CARRY THE BURDEN TO THE N-TH DEGREE MORE THAN WHAT I CARRY IT.

IT REALLY IS. IT'S AN ENORMOUS RESPONSIBILITY.

I'M DOWN TO A HANDFULL OF CLOSING COMMENTS.

SPEAKING ABOUT AGAIN THE DEATH PENALTY VERSUS LIFE WITHOUT THE POSSIBILITY OF PAROLE.

A COUPLE OF THINGS I'D LIKE YOU TO THINK ABOUT.

I DON'T KNOW THAT THESE ARE GOING TO BE PERSUASIVE, BUT PUT THEM IN YOUR MIND AND

USE THEM AS YOU THINK ABOUT THIS CASE AND AS YOU DISCUSS IT.

ULTIMATELY, YOU'VE GOT TO DECIDE LIFE OR DEATH, AND A PRETTY BIG DECISION.

I THINK YOU SHOULD CONSIDER IT AS ONE OF THE MOST IMPORTANT DECISIONS THAT YOU'LL EVER HAVE TO MAKE, AND I THINK YOU WILL FEEL BETTER ABOUT YOURSELF IF YOU DO THAT.

[880] IN LOOKING AT, THOUGH, LIFE OR DEATH, ONE OF THE THINGS WORTH THINKING ABOUT AND TALKING ABOUT I THINK IS THAT HE'S GOING TO GET PUNISHED AND ARE YOU FORGIVING HIM BY GIVING HIM A LIFE SENTENCE.

AND I SUGGEST THAT YOU'RE NOT FORGIVING HIM.

YOU DON'T HAVE TO FORGIVE HIM. YOU DON'T HAVE TO DO THAT TO REACH THAT DECISION.

IN SOME CIRCLES MAYBE THAT'S A GREATER PUNISHMENT.

IF YOU THINK ABOUT IT, DEATH SENTENCE – AND TAKES AWHILE TO CARRY OUT DEATH SENTENCES THESE DAYS. START IT OFF ABOUT TEN YEARS, AND NOW THE TIME IS GETTING SHORTER AND SHORTER AND SHORTER.

PUNISHMENT STOPS ON DEATH. THAT'S THE END OF THE PUNISHMENT.

LIFE WITHOUT PAROLE – THAT'S A SERIOUS THING. MR. HOGMAN [sic] IS RIGHT. IT'S SERIOUS

THING, IT JUST GOES ON AND ON AND ON AND THE PUNISHMENT NEVER EVER STOPS.

WHATEVER HAPPENS, HEREAFTER, AFTER SOMEONE IS GONE IS NOT UP TO US AND THAT DOESN'T MATTER.

THAT PUNISHMENT THAT HE MAY RECEIVE DOESN'T DEPEND WHETHER HE GETS THE LIFE OR THE DEATH PENALTY, HAS NO RELEVANCE TO THAT WHATEVER.

I THINK ONE OF THE –

IF YOU COULD GET THIS RESULT EVERY TIME, IT MIGHT ONE [sic] OF THE HARSHEST PUNISHMENTS YOU COULD PUT [881] ON SOMEBODY AND THAT IS TO HAVE THEM SOME DAY, 30, OR 40 YEARS, WHATEVER IT TAKES, FOR SOMEONE TO COMMENT ON THE ENORMITY OF HIS CRIME, WHEN HE COMMITS THIS KIND OF CRIME, TO SIT DOWN AND REALLY REALIZE WHAT HE'S DONE.

GREATER PUNISHMENT. I THINK.

NOW YOU CAN'T GUARANTEE THAT THAT HAPPENS, BUT SOMETIMES, SOMETIME MAYBE IT WILL HAPPEN, GREATER PUNISHMENT THAN DEATH.

DON'T FORGIVE HIM. I DON'T MEAN, AND I DON'T EXPECT THAT. I DON'T EXPECT YOU HAVE TO DO THAT TO FIND DEATH.

WE HAVEN'T HAD A DEATH SENTENCE CARRIED OUT IN THIS STATE, IN A LONG LONG TIME, 20 YEARS.

IN THE COUNTRY, THINGS ARE PICKING UP.

WE'RE HAVING MORE AND MORE EXECUTIONS.

I SAY THIS JUST HOPEFULLY TO IMPRESS UPON YOU THAT IT IS REAL.

WE'VE HAD I THINK 86 IS THE COUNT SO FAR AND SOMEBODY KEEPS DAILY TABS ON THAT AND PUBLISHES IT IN THE PAPER.

THE PREDICTION HERE IN THIS STATE IS TO START THE EXECUTIONS BACK UP IN SEPTEMBER – I MEAN, I'M SORRY, AFTER THE FIRST OF THE YEAR.

BUT WE'RE GOING TO HAVE THEM.

AND WHEN YOU MAKE THAT DECISION, I THINK YOU SHOULD HAVE IN YOUR MIND THAT IT'S NOT LIKE IT USED TO BE. IT'S A REAL DECISION.

[882] WHEN YOU DECIDE DEATH, IT'S GOING TO BE DEATH.

IF YOU DECIDE LIFE WITHOUT POSSIBILITY OF PAROLE, IT'S GOING TO BE LIFE WITHOUT POSSIBILITY OF PAROLE.

THIS ISSUE OF THE DEATH PENALTY, THOUGH, IS A HIGHLY CHARGED TYPE THING.

A LOT OF POLITICIANS HAVE WON AND LOST CAREERS OVER THIS ONE ISSUE.

TEN YEARS AGO WHEN IT WAS ON THE BALLOT, I THINK IT WAS ON THE BALLOT AS PROPOSITION SEVEN. HIGHLY CHARGED ISSUES. YOU MAY HAVE VOTED FOR IT OR AGAINST IT. I HAVE NO WAY OF

KNOWING, BUT YOU MAY HAVE VOTED FOR IT. SOME OF YOU MAY HAVE BEEN TOO YOUNG TO VOTE FOR IT, BUT YOU MAY HAVE.

THIS LAST ELECTION THREE JUDGES LOST THEIR JOBS OVER THE DEATH PENALTY.

I'M NOT SAYING THAT THEY DID SOMETHING WRONG OR DIDN'T DO SOMETHING WRONG, BUT IT WAS PERCEIVED BY THE PUBLIC THAT THEY DID SOMETHING WRONG BY NOT ENFORCEING [sic] THE DEATH PENALTY, AND THEY LOST THEIR JOBS.

YOU MAY HAVE VOTED AGAINST THEM, YOU MAY HAVE VOTED FOR THEM.

I DON'T THINK THAT MATTERS.

I'M HOPING THAT THE ORIGINAL SCREENING PROCESS THAT WE WENT THROUGH – WE KICKED OUT BOTH ENDS OF THE EXTREMISTS, THE PEOPLE THAT WANT TO VOTE [883] FOR THE DEATH PENALTY ALL THE TIME AND THE PEOPLE WHO WOULDN'T ALL THE TIME, THAT KIND OF THING.

HOW YOU VOTED IS OF NO RELEVANCE AT ALL.

BUT I THINK WHAT YOU SHOULD HAVE IN YOUR MIND, IS THAT WHATEVER VOTE YOU MAKE, WHATEVER PERSONAL VOTE YOU MAKE, THAT'S GOING TO BE CARRIED OUT.

SOMETIME AFTERWARD, YEARS DOWN THE ROAD, YOU'RE GOING TO HEAR MAYBE TUILAEPA ON THE RADIO.

MAYBE IN FIVE YEARS, THERE WILL BE ENOUGH EXECUTIONS YOU WON'T HEAR THEM SO MUCH IN

CALIFORNIA, BUT YOU'LL SOMETIME BEFORE THAT MAY HEAR A SAMOAN SOUNDING NAME. MAYBE YOU'LL FORGET HIS NAME, BUT HE'S GOING TO DIE TOMORROW MORNING OR WHATEVER THE SITUATION IS, AND I'LL GUARANTEE THAT WHEN YOU HEAR THE NAME, YOU HEAR A SAMOAN SOUNDING NAME, YOU'LL THINK BACK ABOUT THIS CASE, YOU WILL HAVE I DON'T KNOW WHAT YOU'RE GOING TO BE DOING, DRIVING A CAR OR HEARING THE RADIO OR AT HOME, BUT YOU WILL THINK ABOUT THIS CASE.

I THINK NOW IS THE TIME TO PREPARE FOR HOW YOU FEEL LATER.

YOU KNOW, THE LITTLE INSTRUCTION OF BEYOND A REASONABLE DOUBT, THE LAST THING IS OR THE PERMANENT, THE ABIDING CONVICTION.

WELL, THIS IS A PERMANENT THING, AND THIS IS THE KIND OF THING THAT WILL PROBABLY STICK WITH YOU A LITTLE BIT LONGER, YOUR EXPERIENCE IN THIS CASE.

[884] I THINK WHAT YOU HAVE TO DO NOW IS TO GET READY TO HEAR THE EXECUTION BEING CARRIED OUT.

THINK OF IT IN THOSE TERMS.

THINK OF IT AS A REAL LIVE, HONEST TO GOODNESS THING, WHATEVER YOU VOTE WILL HAPPEN, AND THEN I ASK YOU TO VOTE, VOTE THAT HE GET LIFE, AND I'M NOT ASKING FOR

FORGIVE [sic] NECESSARY, I'M ASKING THAT YOU VOTE FOR A LIFE SENTENCE.

THANK YOU.

PENALTY PHASE JURY INSTRUCTIONS Vol. 4 p. 884

THE COURT: (READING)

THE DEFENDANT IN THIS CASE, LADIES AND GENTLEMEN, HAS BEEN FOUND GUILTY OF MURDER OF THE FIRST DEGREE.

THE CHARGE THAT THE MURDER WAS COMMITTED UNDER A SPECIAL CIRCUMSTANCE HAS BEEN SPECIALLY FOUND TO BE TRUE.

IT IS THE LAW OF THIS STATE THAT THE PENALTY FOR A DEFENDANT FOUND GUILTY OF MURDER IN THE FIRST DEGREE SHALL BE DEATH OR CONFINEMENT IN THE STATE PRISON FOR LIFE WITHOUT POSSIBILITY OF PAROLE.

IN ANY CASE IN WHICH THE SPECIAL CIRCUMSTANCE CHARGED IN THIS CASE HAS BEEN SPECIALLY FOUND TO BE TRUE.

UNDER THE LAW OF THIS STATE, YOU MUST NOW DETERMINE WHICH OF SAID PENALTIES SHALL BE IMPOSED ON THE DEFENDANT.

[885] IN DETERMINING WHICH PENALTY IS TO BE IMPOSED ON THE DEFENDANT, YOU SHALL CONSIDER ALL OF THE EVIDENCE THAT HAS BEEN RECEIVED DURING ANY PART OF THE TRIAL IN THIS CASE.

YOU SHALL CONSIDER, TAKE INTO ACCOUNT AND BE GUIDED BY THE FOLLOWING FACTORS, IF APPLICABLE:

A, THE CIRCUMSTANCES OF THE CRIME IN WHICH THE DEFENDANT WAS CONVICTED IN THE

PRESENT PROCEEDING AND THE EXISTENCE OF ANY SPECIAL CIRCUMSTANCE FOUND TO BE TRUE.

B, THE PRESENCE OR ABSENCE OF CRIMINAL ACTIVITY BY THE DEFENDANT WHICH INVOLVED THE USE OR ATTEMPTED USE OF FORCE OR VIOLENCE OR THE EXPRESS OR IMPLIED THREAT TO USE FORCE OR VIOLENCE.

C, THE PRESENCE OR ABSENCE OF ANY PRIOR FELONY CONVICTION.

D, THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

E, ANY OTHER CIRCUMSTANCE WHICH EXTENUATES THE GRAVITY IT [sic] OF THE CRIME EVEN THOUGH IT IS NOT A LEGAL EXCUSE FOR THE CRIME.

AND ANY SIMPATHETIC [sic] OR OTHER ASPECT OF THE DEFENDANT'S CHARACTER OR RECORD THAT THE DEFENDANT OFFERS AS A BASIS FOR A SENTENCE LESS THAN DEATH WHETHER OR NOT RELATED TO THE OFFENSE FOR WHICH HE IS ON TRIAL.

YOU MUST DISREGARD ANY JURY INSTRUCTION GIVEN TO YOU IN THE GUILT OR INNOCENCE PHASE OF THIS [886] TRIAL WHICH CONFLICTS WITH THIS PRINCIPLE.

EVIDENCE HAS BEEN INTRODUCED FOR FOR [sic] THE PURPOSE OF SHOWING THAT THE DEFENDANT TUILAEPA HAS COMMITTED CRIMINAL ACTS WHICH INVOLVE THE EXPRESS OR IMPLIED USE OF

FORCE OR VIOLENCE OR THE THREAT OF FORCE OR VIOLENCE.

BEFORE YOU MAY CONSIDER ANY SUCH CRIMINAL ACTS AS AN AGGRAVATING CIRCUMSTANCE IN THIS CASE, YOU MUST FIRST BE SATISFIED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT DID IN FACT COMMIT SUCH CRIMINAL ACTS.

YOU MAY NOT CONSIDER ANY EVIDENCE OF ANY OTHER CRIMINAL ACTS AS AN AGGRAVATING CIRCUMSTANCE.

IT IS NOW YOUR DUTY TO DETERMINE WHETHER OF THE TWO PENALTIES, DEATH OR CONFINEMENT IN THE STATE PRISON FOR LIFE WITHOUT POSSIBILITY OF PAROLE, SHALL BE IMPOSED ON THE DEFENDANT.

AFTER HAVING HEARD ALL THE EVIDENCE AND HAVING HEARD AND CONSIDERED THE ARGUMENTS OF COUNSEL, YOU SHALL CONSIDER, TAKE INTO ACCOUNT AND BE GUIDED BY THE APPLICABLE FACTORS OF AGGRAVATING AND MITIGATING CIRCUMSTANCES UPON WHICH YOU HAVE BEEN INSTRUCTED.

IN WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES DOES NOT MEAN A MERE MECHANICAL COUNTING OF FACTORS ON EACH SIDE OF AN IMAGINARY SCALE OR THE ARBITRARY ASSIGNMENT OF WEIGHTS TO ANY OF THEM.

YOU ARE FREE TO ASSIGN WHATEVER MORAL OR [887] SIMPATHETIC [sic] VALUE YOU DEEM

APPROPRIATE TO EACH AND ALL OF THE VARIOUS FACTORS YOU ARE PERMITTED TO CONSIDER.

IN WEIGHING THE VARIOUS CIRCUMSTANCES, YOU SIMPLY DETERMINE UNDER THE RELEVANT EVIDENCE WHICH PENALTY IS JUSTIFIED AND APPROPRIATE BY CONSIDERING THE TOTALITY OF THE AGGRAVATING CIRCUMSTANCES WITH THE TOTALITY OF THE MITIGATING CIRCUMSTANCES.

TO RETURN A JUDGMENT OF DEATH, EACH OF YOU MUST BE PERSUADED THAT THE AGGRAVATING EVIDENCE IS SO SUBSTANTIAL IN COMPARISON WITH THE MITIGATING CIRCUMSTANCES THAT IT WARRANTS DEATH INSTEAD OF LIFE WITHOUT PAROLE.

YOU SHALL NOW RETIRE AND SELECT ONE OF YOUR NUMBER TO ACT AS FOREMAN WHO WILL PRESIDE OVER YOUR DELIBERATIONS.

IN ORDER TO MAKE A DETERMINATION AS TO THE PENALTY, ALL 12 JURORS MUST AGREE.

ANY VERDICT THAT YOU REACH MUST BE DATED AND SIGNED BY YOUR FOREMAN ON A FORM THAT WILL BE PROVIDED, AND THEN YOU SHALL RETURN WITH IT TO THIS COURTROOM.

THE CLERK WILL SWEAR THE BAILIFF.

THE CLERK: YOU DO SOLEMNLY SWEAR THAT YOU WILL TAKE CHARGE OF THE JURY AND KEEP THEM TOGETHER, THAT YOU WILL NOT SPEAK TO THEM YOURSELF NOR ALLOW ANYONE ELSE TO SPEAK TO THEM UNLESS UPON ORDER OF THE

COURT, AND WHEN THEY HAVE AGREED UPON A VERDICT, YOU'LL RETURN

* * *

8-13-87

We the jury of 12 have *not* come to a unanimous 12-0 verdict.

After 8 ½ hours of deliberation we feel that further deliberations will not make any difference.

Foreman
Jerry Shely

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

The People of the State of California	)	CASE NUMBER A035060
PLAINTIFF(S)	)	DEPARTMENT NUMBER SO G
vs.	)	
TUILAEPA, PAUL PALALAUA	)	VERDICT
DEFENDANT(S)	)	

We, the Jury in the above-entitled action, FIND that the aggravating circumstances substantially outweigh the mitigating circumstances and that the defendant PAUL PALALAUA TUILAEPA should have imposed the sentence of death on him.

FILED
Illegible

This 14th day of AUG. 1987. /s/ Jerry Shely
Foreman

76v210(Rev. 11-81)2-85

VERDICT

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

The People of the State of California	)	CASE NUMBER A035060
PLAINTIFF(S)	)	DEPARTMENT NUMBER SO G
vs.	)	
TUILAEPA, PAUL PALALAUA	)	VERDICT
DEFENDANT(S)	)	

We, the Jury in the above-entitled action, FIND that the aggravating circumstances do not substantially outweigh the mitigating circumstances and that the defendant PAUL PALALAUA TUILAEPA should have imposed on him confinement in the State Prison for LIFE WITHOUT THE POSSIBILITY OF PAROLE.

Illegible

This ___ day of ___ 19__. _____
Foreman

76V225(Rev. 1-81)11-83
C128

VERDICT

Supreme Court of California

[No. S004786. Crim. No. 26420. Dec. 28, 1992.]

THE PEOPLE, Plaintiff and Respondent, v.
PAUL PALALAUA TUILAEPA, Defendant and Appellant.

OPINION

BAXTER, J. – A jury convicted defendant Paul Palalaua Tuilaepa of the first degree murder and attempted robbery of Melvin Whiddon. (Pen. Code, §§ 187, subd. (a), 211/664.)[1] Defendant was also convicted of six counts of robbery (Lee Malstrom, Russell Knapp, Gary Grose, Larry Swanson, Debra Tomassini, and Bruce Monroe) and of two counts of assault with a firearm (Kelvin Whiddon and Kenneth Boone). (§§ 211, 245, subd. (a)(2).) An allegation that defendant personally used a rifle in the commission or attempted commission of each of the foregoing offenses was found true. (§§ 12022.5, 1203.06, subd. (a)(1).) An allegation that defendant inflicted great bodily injury in committing one of the robberies (Bruce Monroe) and both of the assaults (Kelvin Whiddon and Kenneth Boone) was also found true. (§ 12022.7.) Finally, the jury found true a special circumstance that the murder of Melvin Whiddon occurred during the commission of a robbery. (§ 190.2, subd. (a)(17)(i).)

Following a penalty trial, the jury sentenced defendant to death and the trial court denied the automatic

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

motion to modify the verdict. (§ 190.4, subd. (e).) This appeal is automatic. (§ 1239. subd. (b).)

We find no prejudicial error at the guilt or penalty phases of defendant's trial. The judge will be affirmed in its entirely.

I. Guilt Phase Evidence

The crimes occurred at 5:30 p.m. on October 6, 1986, at the Wander Inn Bar in Long Beach. Eight surviving victims were called as witnesses for the prosecution at trial. Viewed as a whole, their eyewitness testimony established the following sequence of events:

A small crowd had gathered to watch Monday night football on television. The front and rear doors were open, and daylight streamed in. The interior lights were on, including those located directly above the bar.

Defendant and another man entered the establishment.[2] Defendant wore a dark jacket and the other man wore a long dark coat. Both men also apparently wore hairnets and "khaki" clothes of some sort. All eight eyewitnesses noticed that defendant was carrying a rifle, and many of them recognized it as a .22-caliber weapon. No one actually saw a weapon in the hands of the other man but – based on the testimony of one witness described below – it appears he was carrying a firearm under his coat.

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[2] Defendant was tried alone. His partner was not identified in these proceedings.

Defendant and his partner approached the bartender, who was standing at the cash register behind the bar with his back to the room. The bartender heard some shouting and turned around. Defendant pointed the rifle in his face and demanded money – "everything" in the register. The bartender, Malstrom, pulled the tray out of the register and set it and the cash on the bar. Defendant and his partner stuffed the money into their pockets.

The pair then split up and began robbing patrons at the bar. Defendant, who was still holding the rifle, moved down the bar to Malstrom's left and confronted three victims. Specifically, defendant took money belonging to Knapp that was lying on the bar in front of him. Defendant then pushed Grose and grabbed his money from the bar and took his wallet. Defendant also pushed Swanson and took his wallet.

Meanwhile, defendant's accomplice took money and a wallet from two victims on the opposite side of the bar – Tomassini and Monroe. When the accomplice reached the end of the bar on his side of the room (i.e., to the bartender's right), he encountered twin brothers Melvin and Kelvin Whiddon. The accomplice pushed Melvin from behind, demanded money, and reached for his wallet. Melvin spun around on his stool and started fighting with the robber. At some point, Melvin knocked the accomplice to the ground.

There was no dispute among witnesses that defendant walked towards the scuffle and, holding the rifle at hip or waist level, shot Melvin in the neck.

Defendant then swung the rifle in Kelvin's direction. Kelvin dropped to the floor and tried to hide behind a post, but was shot by defendant in the chest.

Defendant then turned the rifle in the direction of Monroe's wife. Monroe jumped in front of her and was shot by defendant in the abdomen.

Another patron, Boone, testified that after defendant started shooting, the accomplice stood up and "a couple flashes" – presumably gunshots – came from underneath the accomplice's coat. Both robbers then ran past Boone towards the rear door. Before exiting the bar, defendant aimed the gun at Boone, smiled, and shot him in the neck.

The first shooting victim, Melvin, died at the scene. The autopsy physician described the nature of Melvin's injuries at trial. The other three gunshot victims – Kelvin, Monroe, and Boone – testified about the serious and, in some cases, permanent physical injury they sustained.

All eight eyewitnesses positively identified defendant at the trial and at the preliminary hearing. Each testified that they clearly saw defendant's face from a few inches to a few feet away. Almost everyone had consumed only part of a beer or other alcoholic beverage, and no one had consumed more than one and a half beers.

Of course, not everyone saw, remembered, or described exactly the same details at trial. For example, Knapp positively identified defendant as the man holding the rifle but never saw a second robber. All other witnesses saw both men, but most of them did not get a good look at defendant's accomplice. Tomassini was able

to describe what both men were wearing in the greatest detail, and she was the only person who mentioned the khaki clothes and hairnets. In contrast, Malstrom though defendant might have been wearing a "watchcap," and he did not notice anything on the other robber's head. In addition, while Tomassini believed the incident lasted 10 to 15 minutes, all other witnesses estimated that it lasted 5 minutes or less. As noted, only Boone suggested the defendant's accomplice was armed.

The prosecution also introduced the testimony of Police Officer Pavek who arrived at the scene shortly after the robbery. He testified that the bar was "in shambles," that there were bloodstains on the floor, and that three casings and two expended bullets from a .22 caliber weapon were found inside. Other details about the investigation were not presented at trial.

The defense presented no evidence at the guilt phase.

II. Penalty Phase Evidence

A. *Prosecution Case*

The prosecution presented evidence of several prior crimes and misdeeds by defendant. None were adjudicated, and all occurred while defendant was in custody, primarily with the California Youth Authority (CYA). Defendant's objections to this evidence will be discussed later in the opinion.

1. *Assault – 1982.* Sam Fong, a CYA counselor, testified that in May 1982, he witnessed a fistfight between defendant and another ward, Gages. Fong restrained

defendant with a chokehold, and another counselor pulled Gages aside. Gages sat down and began "tending to his wounds." When Fong eased his chokehold, defendant lunged at Gages but was quickly subdued again by Fong, Defendant threatened to "get" Gages and "the Northerners," and ordered a nearby comrade to get a knife.

Fong explained that rival gangs from the "North and South" populated the facility, and that Gages was from the North and defendant was from the South. Fong also noted that even though wards were prohibited from possessing knives, they were sometimes made or smuggled inside. A search revealed no knife in the possession of defendant or his comrade. However, the fight between defendant and Gages violated institutional rules and was reported.

2. *Threats – 1982.* In July 1982, Debra Heron worked as a counselor at a maximum security CYA facility. Heron testified that defendant became verbally abusive when she patrolled the hall outside his cell two different nights. His remarks consisted of sexual taunts and death threats (e.g., "[I'm] going to fuck [you] in [your] fat white ass, bitch" and "rape [you] and [you will] like it" and "kill you [and] your Momma, too"). During one of the episodes, defendant threw a liquid substance against a screened area of the cell – "tomatoes and possibly water or urine or something of that nature." Cell doors were locked on both occasions. Heron did not believe she was in imminent danger, but defendant's remarks violated institutional rules and were reported.

3. *Weapons possession – 1984.* CYA counselor Lester Kushner testified that in October 1984, he noticed the

"remains of some broken razors" in defendant's cell or on the floor nearby. Institutional rules precluded wards from possessing more than one razor and from removing the blade. A search revealed two razor blades and two other intact razors on defendant's person. "[O]ther contraband indicating gang-related type items" and several batteries taped together were also found in defendant's cell. Kushner explained that the latter item, "a battery pack," was typically held in the hand and used as a punching or striking device. Defendant was the sole occupant of the cell in which the foregoing items were found. Possession of them violated institutional rules and was reported.

4. *Threat – 1984.* CYA employee Gregory Bron testified that in November 1984, defendant attended class wearing pants in which the seams had been cut. Bron escorted defendant to his quarters, confiscated the pants, and told defendant he would be issued a new pair and cited for destroying state property. Defendant said he would burn the pants and burn Bron's face. Bron explained that other wards had previously injured staff by igniting "match bombs," i.e., small container packed with severed matchheads Bron did not believe he was in imminent danger, but defendant's remarks violated institutional rules and were reported.

5. *Threats – 1985.* In September 1985, Michelle McDowell Roberts worked as a supervisor at a maximum security CYA facility. Roberts testified that defendant became verbally abusive when she patrolled the hall outside his room two different nights. He threatened some sort of torture and death, and sexually taunted her (e.g., "how would I like his dick up my ass"). On both occasions, defendant was locked in a room or cell. Roberts

apparently did not believe she was in imminent danger, but defendant's remarks violated institutional rules and were reported.

6. *Assault – 1986.* Robert Sedillo, a CYA supervisor, described an incident that occurred when he escorted defendant from the infirmary in May 1986. Defendant kicked another ward in the face as he sat in the hallway waiting for a medical appointment. The attack appeared to be unprovoked, and both defendant and his victim had their hands handcuffed behind their backs at the time. The assault violated institutional rules and was reported.

7. *Robbery and assault – 1987.* Daniel Chatters and defendant shared a cell in the courthouse lockup at the time of trial in this case. Chatters testified that a few days before his testimony, defendant became angry when Chatters would not give money to defendant. Defendant repeatedly struck and injured Chatters, and took $12 that Chatters was carrying on his person.

B. *Defense Case*

1. *Family history.* Defendant's mother, Mrs. Tuilaepa, and his sister Sanita testified as follows: Defendant was raised in a two-parent home and is the youngest of twelve children. The family moved to the United States from Samoa when defendant was a boy. Mrs. Tuilaepa never learned to speak English, and the family apparently communicates in Samoan.

Defendant was purportedly well behaved as a child. However, he began getting into trouble with his friends

at age 14 or 15, and was periodically removed from the home by authorities.

The family has experienced many difficulties over the years but has apparently remained close. Defendant's father died a few years before the capital trial, and one of defendant's brothers was shot and killed in a fight. Another brother, Joe, was shot at a party and is now paralyzed and confined to a wheelchair. As adults, defendant and Joe lived with their mother, and defendant assisted in Joe's care. Sister Sanita and her husband were active in the church and, along with their children, lived with Mrs. Tuilaepa. Several family members regularly attended the capital trial. Mrs. Tuilaepa and Sanita testified that the family cares for defendant and wants his life to be spared.

2. *Expert testimony.* Dr. Maloney, a psychologist, performed various psychological and intelligence tests on defendant and interviewed members of his family. Dr. Maloney saw no sign of "neurological disability," but noted defendant appeared depressed and reticent when interviewed. Defendant performed poorly on verbal tests and received an IQ score in the low 70's placing him in the bottom 5 percent of the population. However, on test of nonverbal reasoning, defendant performed in the normal range. Dr. Maloney concluded that defendant has "normal intellectual potential" but is deficient in his knowledge and understanding of English. The results were "not surprising" since defendant spent the first few years of his life in Samoa and the family communicates primarily in Samoan. Dr. Maloney testified that defendant has the mental capacity to understand that homicide is wrong.

III. Guilt Phase Issue

Defendant challenges the guilt judgment solely on the ground he was improperly shackled in the trial court. For reasons we will explain, no prejudicial error occurred.

A. *Background*

The contemporaneous record of proceedings before and during trial is silent on whether defendant was shackled or physically restrained.

Appellate counsel raised the shackling question towards the end of a record settlement and correction hearing held about a year after the penalty verdict was rendered. The hearing was conducted by the judge who presided at trial and took place in the same courtroom. The district attorney who prosecuted the case and defendant's trial and appellate counsel were also present.

In response to appellate counsel's request for a stipulation on whether defendant was restrained during trial, the district attorney, trial counsel, and the court orally agreed that defendant's ankles were always shackled in some manner, but that his chair was pushed "all the way" under the table so the jury could not see his feet. None of these participants recalled any handcuffs or chains on defendant's wrists, hands, or waist in the jury's presence. The district attorney and trial counsel maintained that defendant entered and exited the courtroom through a rear door that was evidently private, and that the jury "always" waited outside in the hallway until defendant was seated and his ankle restraints were presumably

hidden from view. In response to a specific reference in the record on voir dire, no one recalled whether defendant actually stood up and faced prospective jurors while shackled.[3]

Trial counsel testified at the record settlement hearing in a manner consistent with the foregoing stipulated facts. Counsel further recalled under oath that defendant was thought to be dangerous and a flight risk during trial because he and a brother in attendance were gang members.

Defendant testified at the same hearing but gave a somewhat different version of events. Defendant said he always wore ankle shackles and occasionally wore handcuffs and a waistchain in the courtroom and courthouse. Defendant claimed he "sometimes" entered the courtroom through the private door and "sometimes" entered through the outer hallway. Defendant testified that, on some of the latter occasions, he could "see jurors" in the hall. He did not say whether they were jurors in his case or whether they saw him.

Over the district attorney's objection, appellate counsel was allowed to conduct an "experiment" in an effort to "settle" the record as to whether defendant's restraints could have been seen by the jury. At the direction of appellate counsel, trial counsel stood and sat in the "general area" of the jury box and said he could see the waist

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[3] The record indicates that, during voir dire, the court asked defendant to stand up and turn towards prospective jurors "if you can." Appellate counsel suggests here, as at the record settlement hearing, that this language implies defendant was restrained at the time.

chain and ankle shackles defendant was then wearing. The district attorney and trial counsel each observed, however, that some of the furniture, particularly defendant's chair, was not in the same position during the experiment as during trial.

Appellate counsel also moved to take photographs of the courtroom and send a questionnaire to jurors asking whether defendant had been restrained during trial. The district attorney objected on grounds such matters could not properly be included in the appellate record. The court agreed and denied defendant's request.

The court did not make any findings or issue a settled statement about shackling after the hearing.

B. *Analysis*

(1) Based on the foregoing facts, defendant assumes he was subjected to physical restraints that were visible to the jury. Defendant observes there was no evidence or finding of a "manifest need" for such security measures and no instruction informing the jury to disregard the restraints as required by *People v. Duran* (1976) 16 Cal.3d 282, 291-292 [127 Cal.Rptr. 618, 545 P.2d 1322, 90 A.L.R.3d 1]. According to defendant, noncompliance with *Duran* prejudicially violated his rights under the Fifth, Sixth and Eighth Amendments to the federal Constitution and comparable provisions of the state Constitution (art. I, § 7) and statute (§ 688).

We disagree. It is settled that the use of physical restraints in the trial court cannot be challenged for the first time on appeal. Defendant's failure to object and

make a record below waives the claim here. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 95 [270 Cal.Rptr. 817, 793 P.2d 23]; *People v. Walker* (1988) 47 Cal.3d 605, 629 [253 Cal.Rptr. 863, 765 P.2d 70]; *People v. Duran, supra,* 16 Cal.3d 282, 289.)

In apparent recognition of the waiver problem, defendant argues trial counsel was ineffective in failing to object to the use of restraints. However, counsel's performance could not possibly have affected the outcome at trial. The guidelines imposed by *People v. Duran, supra,* 16 Cal.3d 282, 290, are intended, in large part, to avoid prejudice in the minds of jurors where a defendant appears or testifies in obvious restraints, or where the restraints deter him from taking the stand in his own behalf. We have consistently found any unjustified or unadmonished shackling harmless where there was no evidence it was seen by the jury. (*People v. Cox* (1991) 53 Cal.3d 618, 652 [280 Cal.Rptr. 692, 809 P.2d 351] [defendant's handcuffs and leg braces not seen by jury]; *People v. Medina* (1990) 51 Cal.3d 870, 897-898 [274 Cal.Rptr. 849, 799 P.2d 1282] [same]; see also *People v. Allen* (1986) 42 Cal.3d 1222, 1264 [232 Cal.Rptr. 849, 729 P.2d 115] [shackles of defense witness not seen by jury]; *People v. Fierro* (1991) 1 Cal.4th 173, 220 [3 Cal.Rptr.2d 426, 821 P.2d 1302] [defendant's handcuffs and shackles not seen by key prosecution witness at preliminary hearing].) In *Cox* and *Medina,* we also found no evidence the restraints influenced the defendant's decision not to take the stand.

Nothing in the record on appeal clearly establishes that the jury did or could see defendant's restraints. The court and counsel agreed that efforts had been taken to

conceal defendant's ankle shackles from the jury whenever he appeared in court. Defendant's posttrial "experiment" did not conclusively show such efforts had failed. Defendant's version of events also implied, at most, that jurors might have seen him handcuffed and/or shackled in the hallway of the courthouse and might have assumed such restraints were not removed during trial. However, the trial court made no findings in this regard and never credited defendant's account. In addition, defendant did not testify at any phase of trial and there is no indication he would have testified but for the restraints.

Even assuming the jury saw the restraints under the circumstances suggested by defendant, the result remains the same. Prejudicial error does not occur simply because the defendant "was seen in shackles for only a brief period either inside or outside the courtroom by one or more jurors or veniremen." (*People v. Duran, supra,* 16 Cal.3d 282, 287, fn. 2.) The judgment was reversed in *Duran* based on multiple errors in a close case, including improper exclusion of evidence, restrictive cross-examination, and the heavy shackling of a defendant who took the stand and whose credibility was presumably damaged as a result. (*Id.*, at pp. 295-296.) In subsequent cases, however, visible shackling did not warrant reversal of the judgment. (*People v. Sheldon* (1989) 48 Cal. 3d 935, 946 [258 Cal.Rptr. 242, 771 P.2d 1330]; *People v. Rich* (1988) 45 Cal.3d 1036, 1084-1085 [248 Cal.Rptr. 510, 755 P.2d 960].)

The instant case is analogous to *Sheldon* and *Rich.* Strong guilt evidence in the form of eight positive eyewitness identifications established that defendant shot four individuals and killed one of them in the course of robbing people in a neighborhood bar. No other guilt

errors are raised on appeal or are evident from the record, and no prejudicial error occurred at the penalty phase for reasons we will explain. Defendant elected not to testify in his own behalf. Any glimpse jurors might have received of the restraints as defendant entered the courtroom could not possibly have shocked them or affected their assessment of the evidence.[4]

(2) Defendant also argues the trial court erred in denying his posttrial motion to "settle" the record with photographs of the courtroom and jury questionnaires about shackling. Defendant insists he was deprived of his right to an adequate record and meaningful appeal as a result.

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[4] Defendant asks that we take judicial notice of two juror declarations, one by Foreman Sheby and the other by Alternate Juror Shilinga. Although the declarations differ in several respects, Sheby and Shilinga agree that they occasionally saw defendant enter the courtroom in some type of restraints and neither one says the restraints were thereafter removed.

Contrary to what defendant argues, the facts asserted in the declarations are subject to dispute, are not readily verifiable, and are not the proper subject of judicial notice. (Evid. Code, § 452, subd. (h); see also Evid. Code, § 459.) The declarants themselves disagree on the frequency and type of restraints, and they do not uniformly describe the vantage point from which the restraints were allegedly seen. Similar discrepancies also exist between the juror declarations on the one hand and the facts as remembered by the court and counsel at the record settlement hearing on the other hand.

In any event, the declarations add little to defendant's posttrial testimony suggesting jurors might have seen his restraints as he entered the courtroom. No prejudice is shown for reasons already stated.

We disagree. The rules authorizing settlement, augmentation, and correction of the record on appeal concern documents "file[d] or lodged" in the superior court and transcripts of "oral proceedings" that occurred therein. (Cal. Rules of Court, rules 7(b), 12(a), 36(b).) These provisions – much like the entire network of rules governing matter properly included in the appellate record – are intended to ensure that the record transmitted to the reviewing court preserves and conforms to the proceedings actually undertaken in the trial court. (See, e.g., *People v. Pinholster* (1992) 1 Cal.4th 865, 922 [4 Cal.Rptr.2d 765, 824 P.2d 571] [settled statement of unreported bench conferences between court and counsel]; *People v. Wright* (1990) 52 Cal.3d 367, 401, fn. 6 [276 Cal.Rptr. 731, 802 P.2d 221] [settled statement of unreported bench discussion between court and juror]; *People v. Holloway* (1990) 50 Cal.3d 1098, 1116 [269 Cal.Rptr. 530, 790 P.2d 1327] [settled statement of unreported in-chambers discussion between court and counsel].) The settlement, augmentation, and correction process does not allow parties to create proceedings, make records, or litigate issues which they neglected to pursue earlier.

Because there were no motions or oral proceedings concerning shackling in the trial court, there was nothing for the parties to "settle" here. Defendant is entitled to an appellate record that accurately reflects what was done and said in the trial court – not what he wishes had been done or said. It follows that all of defendant's posttrial efforts to create a record on this issue were unauthorized and incompetent. Hence, the trial court's decision to bar some of these efforts, namely photographs and questionnaires, cannot warrant reversal of the judgment.

IV. Penalty Phase Issues

A. *Death-qualifying Voir Dire*

At defendant's request, the court limited voir dire on the death penalty to four standard questions based on *Witherspoon v. Illinois* (1968) 391 U.S. 510 [20 L.Ed.2d 776, 88 S.Ct. 1770] (*Witherspoon*). Under *Witherspoon*, a prospective juror can be excluded for cause where he makes it "unmistakably clear" he would "automatically" vote a certain way on penalty. (*Id.*, at p. 522, fn. 21 [20 L.Ed.2d at p. 785].) A juror with such views is also "substantially impair[ed]" and excludable under *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [83 L.Ed.2d 841, 851, 105 S.Ct. 844] (*Witt*). *Witt* clarified *Witherspoon* and was decided before jury selection began in this case.

The court instructed prospective jurors before individual voir dire began (see *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80 [168 Cal.Rptr. 128, 616 P.2d 1301]) that they were to give yes or no answers to the foregoing questions. During each individual session, the court typically presented the *Witherspoon* questions, sought some clarification, and then permitted counsel to ask follow-up questions.

(3) Defendant first challenges the manner in which the court questioned three prospective jurors (Maloney, Harris, Donlan). Defendant insists the court "coerced" them into answering "yes" to the *Witherspoon* questions that sought to ascertain a pro-life bias. Defendant also contends the court failed to vigorously pursue whether the "yes" answers given were sincere and unequivocal. The prosecutor successfully challenged Maloney and

Harris for cause, and used a peremptory challenge to strike Donlan.

We see no error in the court's voir dire. As to all three jurors, the court indeed urged a definitive answer where an equivocal or ambiguous one was initially given, or reasked the question in a slightly different way when a "yes" answer was given. However, the questions logically called for a definitive answer, and there was nothing inherently coercive in the court's method. We can only assume the court ended questioning when it determined that the "yes" answer given by each juror was sincere. No restrictions were placed on defendant's right to question them further.

(4) Defendant contends trial counsel was ineffective in failing to sufficiently rehabilitate five prospective jurors who indicated to the court that they were predisposed against the death penalty (Maloney, Harris, Haley, Groeppel, and Sedlack). The prosecutor successfully challenged all of them for cause.

Nothing in the record indicates that counsel lacked a plausible, tactical reason for asking these individuals few or no follow-up questions. (See, e.g., *People v. Lewis* (1990) 50 Cal.3d 262, 289-290 [266 Cal.Rptr. 834, 786 P.2d 892].) Indeed, counsel might have determined from the demeanor of these prospective jurors that additional questioning would be futile. Counsel might also have reasonably concluded that any ambiguity in the answers they had already given would be beneficial and would

promote retention of pro-life jurors.[5] No constitutional deficiency in counsel's performance on voir dire has been shown.[6]

B. *Boyd Claim*

Defendant challenges several unadjudicated acts of misconduct admitted in the prosecution's case-in-chief at the penalty phase. Defendant observes that "criminal activity" involving the "use or attempted use of force or violence or the express or implied threat to use force or violence" is admissible under section 190.3, factor (b) (hereafter factor (b)). Defendant argues here, as he did to some extent below, that the challenged evidence does not

[5] For example, in response to the court's questioning, prospective Juror Harris ambiguously indicated that she had "mixed" feelings about the death penalty and believed it was appropriate "in some cases," but that she would "automatically" refuse to consider or vote for it in the instant case. Defense counsel then asked Harris whether any preference for life imprisonment extended to "every" case, and she said, "yes." Counsel asked no further questions. He could reasonably have concluded that further inquiry along these lines might only solidify Harris's apparent pro-life bias and increase the likelihood that she would be excused.

[6] Defendant also argues trial counsel was ineffective because he did "nothing" to explore prospective jurors' attitudes towards racial prejudice. However, counsel has no duty in the abstract to inquire on a particular subject. There is also no indication that any biased individual actually sat on defendant's jury.

satisfy the "crime" and/or "violence" requirement of factor (b), and that it was therefore irrelevant to any statutory aggravating factor. (*People v. Boyd* (1985) 38 Cal.3d 762, 772-778 [215 Cal.Rptr. 1, 700 P.2d 782].)[7]

(5) On appeal, such claims must be rejected where there is substantial evidence from which a jury could conclude beyond a reasonable doubt that violent criminal activity occurred. (*People v. Boyd, supra,* 38 Cal.3d at p. 778.) As we will explain, no prejudicial error occurred in this post-*Boyd* penalty trial.

1. *Assault – 1982.* (6) Defendant first complains about Fong's testimony describing a fistfight between defendant and another CYA inmate. Defendant recognizes that evidence of a "jailhouse scuffle" is admissible under factor (b) where the jury could conclude the defendant was not acting in self-defense and was therefore guilty of criminal assault. (*People v. Lucky* (1988) 45 Cal.3d 259, 291 [247 Cal.Rptr. 1, 753 P.2d 1052].) Defendant appears to concede that Fong's "scuffle" testimony was admissible under *Lucky,* but asks us to reconsider that rule.

We decline to do so. The Attorney General correctly observes that defendant did not object to this evidence on any grounds at trial, and has therefore waived the claim. (*People v. Mickle* (1991) 54 Cal.3d 140, 186 [284 Cal.Rptr. 511, 814 P.2d 290].) In any event, Fong's testimony strongly suggests that defendant was not only a willing

[7] For the most part, any *Boyd* objections raised below were handled in an evidentiary hearing held before the start of the penalty trial.

combatant but the aggressor in the incident. (*People v. Lucky, supra,* 45 Cal.3d 259, 291.) Defendant apparently had the upper hand in the fight because only his opponent, Gages, was injured. Even after defendant was restrained and Gages retreated to nurse his wounds, defendant attempted to inflict additional harm and threatened future retaliation when officials intervened a second time. The penalty jury was entitled to know that defendant engaged in such disruptive, assaultive behavior in custody.

(7) Defendant also insists the court erred in allowing Fong to suggest that defendant's threat against Gages and other "Northerners" was a gangland reference, and that the two combatants were affiliated with rival groups. Defendant insists this evidence was irrelevant and prejudicial, and that it should have been excised from any otherwise admissible portions of Fong's testimony.

Lack of an objection at trial waives the claim on appeal. And, contrary to defendant's suggestion on the merits, nothing bars evidence of gang affiliation that is directly relevant to a material issue. (Compare *Dawson v. Delaware* (1992) 503 U.S. ___ [117 L.Ed.2d 309, 318, 112 S.Ct. 1093, 1098]; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-906 [184 Cal.Rptr. 165, 647 P.2d 569].) Testimony linking defendant and Gages to rival gangs was admissible because it tended to explain the reason for the fight. (*See People v. Melton* (1988) 44 Cal.3d 713, 757 [244 Cal.Rptr. 867, 750 P.2d 741].) We have only suggested a contrary result under factor (b) where no connection between prison gangs and violent prison crime was made. (See, e.g., *People v. Malone* (1988) 47 Cal.3d 1, 30 [252 Cal.Rptr. 525, 762 P.2d 1249].) Here, the jury was entitled to know

that the assault on Gages was evidently not the product of a personal grievance but of a larger social evil.

2. *Weapons possession – 1984.* (8) Defendant next challenges Kushner's testimony describing several unauthorized items found in defendant's CYA cell. Defendant claims that, because the extra razors and razor blades and the "battery-pack" are not inherently "deadly," there was insufficient evidence from which the jury could infer he violated laws prohibiting possession of deadly weapons by inmates. (See, e.g., § 4574, subd. (a).) Defendant also suggests mere possession of even a deadly weapon does not involve the threat of violence. He does not dispute that discovery of the items on his person and his cell amounted to "knowing" possession.

We reject the Attorney General's suggestion that the claim has been waived. Defendant preserved the issue by raising a similar, comprehensive challenge to the "razor incident" before the evidence was admitted at trial.

Nevertheless, the claim fails on the merits. It is settled that a defendant's knowing possession of a potentially dangerous weapon in custody is admissible under factor (b). Such conduct is unlawful and involves an implied threat of violence even where there is no evidence defendant used or displayed it in a provocative or threatening manner. (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1186-1187 [270 Cal.Rptr. 286, 791 P.2d 965]; *People v. Lucky, supra,* 45 Cal.3d 259, 291-292; *People v. Harris* (1981) 28 Cal.3d 935, 962-963 [171 Cal.Rptr. 679, 623 P.2d 240].) The trier of fact is free to consider any "innocent explanation" for defendant's possession of the item, but such inferences do not render the evidence inadmissible per

se. (*People v. Mason* (1991) 52 Cal.3d 909, 956-957 [277 Cal.Rptr. 166, 802 P.2d 950].) Hence, the court did not err in admitting evidence about the razors and blades and the "battery-pack" found in defendant's possession while in CYA custody.

(9) Defendant also argues that Kushner's related testimony about "contraband" of a "gang-related" nature was inadmissible because there was no evidence defendant's possession of these unspecified items was criminal or involved any threat of violence. We agree. However, the reference to "contraband" was brief and vague and could not have been prejudicial in light of other more serious evidence of defendant's misconduct in custody, namely, weapons possession, three separate assaults, and one robbery. Similarly, Kushner's reference to the possession of "gang" paraphernalia was cumulative given other properly admitted testimony about the gang-motivated assault upon Gages.

3. *Threats – 1982, 1984, 1985.* As noted, the prosecution introduced evidence of several outbursts while in CYA custody. Two female supervisors, Heron and Roberts, testified that defendant was locked in his cell in a maximum security facility at the time he made sexual taunts and death threats, and Roberts said defendant threw a vile liquid against a screened area of the cell during one of the episodes. A male adviser, Bron, testified that he reprimanded defendant for cutting the seams on his pants and that defendant threatened to burn the pants and burn Bron's face. Bron also mentioned the use of "match bombs" by other inmates.

(10) Defendant challenges testimony by all three witnesses recounting his in-custody statements. He relies on the general notion that abusive and even threatening language does not violate a penal statute and is inadmissible under factor (b). (See *People v. Wright, supra,* 52 Cal.3d 367, 425-426 and cases cited.) Defendant also argues that evidence of other circumstances surrounding the outbursts was not independently admissible, e.g., thrown liquid, torn pants, unrelated "match bomb" incidents, and defendant's maximum security status.

Some of these *Boyd* claims have been waived. At trial, defendant challenged the "threat" testimony given by Heron and Roberts, but did not repeat the objection when the admissibility of Bron's testimony was raised later in the proceedings. Defendant also did not make and preserve objections to any other details described by these witnesses.

On the merits, we disagree with the Attorney General's claim that the threats violated section 71, which prohibits certain threats against public employees.[8] There was no substantial showing that defendant harbored the requisite intent – interfering with the performance of official duties – or that his statements had the requisite effect – creating a reasonable belief the threat would be

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[8] Section 71 provides that "[e]very person who, with intent to cause, attempts to cause, or causes, . . . any public officer or employee to do, or refrain from doing, any act in the performance of his duties, by means of a threat, directly communicated to such person, to inflict an unlawful injury upon any person or property, and it reasonably appears to the recipient of the threat that such threat could be carried out," is guilty of a crime.

carried out. (*People v. Boyd, supra,* 38 Cal.3d 762, 777.) Defendant had no apparent history of attacking or injuring CYA officials, and the recipients of these threats indicated they did not actually fear for their safety. Defendant was locked in his cell for the night when he harassed the two women, and his response to Bron's criticism was obviously intended as an angry retort.

We are also not persuaded by the Attorney General's attempt to characterize the act of throwing liquid in Heron's presence as an assault and battery. Nothing in the record suggests the liquid touched her or was even thrown in her direction. (Compare *People v. Pinholster, supra,* 1 Cal.4th 865, 961 [act of throwing urine in deputy's face is admissible under factor (b)].) This incident, like the damaged pants seized by Bron, can only reasonably be construed as inadmissible property damage. (*People v. Boyd, supra,* 38 Cal.3d 762, 776-777.) In addition, Bron's reference to "match bomb" injuries inflicted by other inmates was irrelevant absent any evidence connecting defendant to these events. The "maximum security" status described by the two female witnesses did not provide context for any other admissible act.

(11) Nevertheless, the foregoing testimony was harmless. At most, it suggested defendant had difficulty submitting to authority and controlling his violent impulses. The jury could draw the same unfavorable character inferences from evidence properly admitted in aggravation. The circumstances of the capital crime included defendant's attempt to kill four bar patrons in a gratuitous and cold-blooded manner. Admissible background evidence also showed a pattern of nonconforming

and violent behavior, namely three assaults and the possession of potentially dangerous weapons while in custody. At least two of the assaults were unprovoked, two occurred in the presence of CYA officials, and one was incidental to a robbery. There is no reasonable possibility the penalty verdict would have been different absent evidence of threats and insults against CYA personnel.

C. *"Other-crimes" Instruction*

The court gave the standard instruction prohibiting the jury from considering other violent crimes admitted in aggravation under factor (b) unless they had been proven beyond a reasonable doubt. The instruction did not describe or otherwise identify any of the acts to which it might apply. Both the prosecutor and defense counsel requested and approved the instruction as given.[9]

(12) Defendant claims the trial court erred in not including in the instruction the names and elements of the crimes offered by the prosecution under factor (b).

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[9] The instruction said, in full: "Evidence has been introduced for the purpose of showing that defendant Tuilaepa has committed criminal acts which involved the express or implied use of force or violence or the threat of force or violence. Before you may consider any of such criminal acts as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal acts. You may not consider any evidence of any other criminal acts as an aggravating circumstance." (See CALJIC No. 8.84.1.2 (1983 new).)

Defendant argues that, absent such a "frame of reference," the jury might have improperly based their penalty determination on acts which were not criminal or violent or which had not been proven to the requisite level of certainty. Defendant claims his constitutional rights to due process and a reliable penalty determination were violated as a result.

However, as defendant seems to concede, it was settled even before the penalty trial in this case that the trial court has no sua sponte duty to instruct in the manner now urged. (*People v. Hardy* (1992) 2 Cal.4th 86, 205-207 [5 Cal.Rptr.2d 796, 825 P.2d 781]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1075 [5 Cal.Rptr.2d 230, 824 P.2d 1277]; *People v. Davenport* (1985) 41 Cal.3d 247, 281-282 [221 Cal.Rptr. 794, 710 P.2d 861]; *People v. Phillips* (1985) 41 Cal.3d 29, 68 & 72-73, fn. 25 [222 Cal.Rptr. 127, 711 P.2d 423].) The rule recognizes that, for tactical reasons, defendants in the vast majority of cases do not want to risk highlighting prior violent crimes or alienating the jury with hypertechnical defenses to bad acts which otherwise seem clearly aggravating. Hence, in the absence of a request from the defense, the court did not err in failing to give a more detailed factor (b) instruction.

Defendant claims counsel's failure to request such an instruction amounted to ineffective assistance. However, nothing in the record indicates counsel lacked a plausible tactical reason for failing to request additional instruction on aggravating crimes and elements. (*People v. Pope* (1979) 23 Cal.3d 412, 426, fn. 16 [152 Cal.Rptr. 732, 590 P.2d 859, 2 A.L.R.4th 1].) To the contrary, the record suggests counsel sought to deemphasize the significance of defendant's misconduct while in CYA custody. Counsel stressed in

closing argument that defendant had no prior felony convictions, and that any unadjudicated CYA violations might have been "distateful" but were forgivable given defendant's youth at the time. Defendant has not met his burden of establishing constitutionally deficient representation in counsel's failure to request an instruction highlighting the conduct the jury could consider under factor (b).

In any event, we reject defendant's claim that he was prejudiced by the lack of such an instruction. Our review of the record discloses convincing evidence of all criminal conduct properly admitted under factor (b) – the fight with inmate Gages, the unprovoked assault on another ward outside the infirmary, the assault and robbery of inmate Chatters, and the possession of potentially dangerous weapons while in CYA custody. There is no indication that an instruction on specific crimes and elements would have changed the jury's assessment of evidence admitted under factor (b) or would have affected the outcome at trial.

D. *Instruction on Sentencing Discretion*

The court gave the 1986 version of CALJIC No. 8.84.2. The instruction explains the manner in which the jury is to weigh the aggravating and mitigating circumstances and select the appropriate punishment, and was drafted in response to *People v. Brown* (1985) 40 Cal.3d 512 [220 Cal.Rptr. 637, 709 P.2d 440] (revd. on other grounds *sub nom. California v. Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837]). (13) At issue here is a portion of the instruction saying that "[to] return a judgment of

death, each [juror] must be persuaded that the aggravating evidence is *so substantial* in comparison with the mitigating [evidence] that it warrants death instead of life without parole." (Italics added.)[10] On its written verdict form, the jury specifically found that aggravation "substantially outweigh[ed]" mitigation.

Defendant notes that the instruction, as given, did not contain language from section 190.3 saying that the

[10] The instruction stated, in full: "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant. [¶] After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. [¶] You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree." (See CALJIC No. 8.84.2 (1986 rev.).)

jury "shall impose" life imprisonment if it finds mitigation outweighs aggravation. Defendant argues that omission of this language and the alleged ambiguity of the "so substantial" language gave the jury unfettered discretion to impose death. He insists these instructional features violated the due process, ex post facto, and cruel and unusual punishment clauses of the federal and state Constitutions.

We disagree. As noted, the instruction used language suggested by *People v. Brown, supra,* 40 Cal.3d 512, 541-542, footnote 13. There, we noted that because aggravating and mitigating circumstances are weighed in the context of determining which of the law's two most serious penalties applies, the jury must understand that the decision is not whether the "bad" evidence outweighs the "good" but whether defendant is deserving of the most severe punishment – death. Consistent with *Brown,* the instructional language makes manifestly clear that death may be imposed *only* where aggravation "so substantially" outweighs mitigation that death, rather than life imprisonment, is appropriate. The converse principle emphasized by defendant here – that the jury must impose life imprisonment in all other circumstances – is obvious, and no reasonable jury could have been misled in this regard.

We used the same reasoning to reject a similar attack on the same instructional language in *People v. Duncan* (1991) 53 Cal.3d 955, 978 [281 Cal.Rptr. 273, 810 P.2d 131]. Defendant asks us to reconsider *Duncan,* but we see no reason to do so. We conclude the jury was properly instructed on the scope of its sentencing discretion.

E. *Constitutionality of the Death Penalty Law*

(14) Defendant broadly attacks the constitutionality of section 190.3, which enumerates the factors deemed relevant to the capital sentencing determination. Defendant argues that submission to the penalty jury of factors (a) (circumstances of the capital crime), (b) (other violent criminal activity), and (i) (defendant's age at time of crime), without further clarifying language not identified here, precludes a meaningful and guided distinction between those murders that warrant the death penalty and those that do not.[11] Assuming without deciding that section 190.3 is subject to such "vagueness" concerns (see *Stringer v. Black* (1992) 503 U.S. ___ [117 L.Ed.2d 367, 112 S.Ct. 1130]), we reject this claim.

It is settled that the "facts and circumstances of the defendant, his background, and his crime" are relevant to the sentencing decision (*Clemons v. Mississippi* (1990) 494 U.S. 738, 748 [108 L.Ed.2d 725, 738, 110 S.Ct. 1441]), and that the state, within certain limits, has broad latitude to decide how such facts are to be presented and considered at the penalty phase (*Payne v. Tennessee* (1991) 501 U.S. ___ [115 L.Ed.2d 720, 735, 111 S.Ct. 2597]; *Boyde v. California*

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[11] Section 190.3 provides in pertinent part: "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true. . . . [¶] (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence. . . . [¶] (i) The age of the defendant at the time of the crime."

(1990) 494 U.S. 370, 377 [108 L.Ed.2d 316, 326, 110 S.Ct. 1190]). By the same token, the individualized penalty determination required by the Eighth Amendment makes inevitable application of the sentencer's own values, perceptions, and experiences to the factors the state properly deems relevant. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110-112 [71 L.Ed.2d 1, 8-9, 102 S.Ct. 869].)

As we very recently held, the language of factor (a), concerning the "circumstances of the [capital] crime," embodies a consideration that the United States Supreme Court itself has identified as "one of the criteria upon which the jury *should* base its penalty determination," and withstands the type of vagueness challenge raised here. (*People v. Proctor, ante*, 499, 551 [___ Cal.Rptr.2d ___, ___ P.2d ___] and cases cited.) Factor (b) focuses the sentencer's attention on other crimes (i.e., punishable offenses) committed by the defendant involving his use or threatened use of force against any person. (*People v. Phillips* (1985) 41 Cal.3d 29, 72 [222 Cal.Rptr. 127, 711 P.2d 423]; *People v. Boyd* (1985) 38 Cal.3d 762, 776 [215 Cal.Rptr. 1, 700 P.2d 782].) Factor (i) directs the sentencer to consider whether the defendant's age at the time of the capital crime gives rise to inferences about his relative youth or maturity which in "common experience or morality . . . might reasonably inform the choice of penalty. . . . " (*People v. Lucky, supra*, 45 Cal.3d 259, 302.)

By their express terms, factors (a), (b), and (i) thus direct the sentencer's attention to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on his moral culpability. Having met these standards of relevance and specificity, factors (a), (b), and (i) are not "illusory" or otherwise

impermissibly "vague" (*Stringer v. Black, supra,* 503 U.S. ___, ___ [117 L.Ed.2d 367, 382]) simply because they leave the sentencer free to evaluate the evidence in accordance with his or her own subjective values.

Defendant also argues that the 1978 death penalty statute is unconstitutional because it lacks adequate safeguards to protect against "arbitrary" death judgments and ensure "guided" sentencing discretion. He concedes we have implicitly or explicitly rejected all of his claims before, but asks us to reconsider our conclusions. (See, e.g., *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-779 [230 Cal.Rptr. 667, 726 P.2d 113].) We affirm that, contrary to defendant's contentions:

1. The jury need not employ the beyond-a-reasonable-doubt standard in deciding whether aggravating factors (other than violent criminal conduct) are present, whether aggravation outweighs mitigation, and whether death is the appropriate sentence;

2. The jury need not make written findings or agree unanimously on the presence of aggravating factors;

3. The jury need not be instructed to presume that life without possibility of parole is appropriate sentence;

4. Existing appellate procedures provide for adequate review of a death judgment.

V. Disposition

The judgment is affirmed in its entirety.

Lucas, C. J., Panelli, J., and George J., concurred.

MOSK, J. – I concur in the judgment. After review, I have found no reversible error or other defect.

I write separately to make two points, one specific to this case and the other of more general applicability.

The first concerns defendant's appointed trial counsel, an attorney who is no stranger to this court. (See, e.g., *People v. Wilson* (1992) 3 Cal.4th 926 [13 Cal.Rptr.2d 259, 838 P.2d 1212]; *In re Wilson* (1992) 3 Cal.4th 945 [13 Cal.Rptr.2d 269, 838 P.2d 1222].) To my mind, counsel's performance was deficient in many regards. That is to say, it failed to satisfy an objective standard of professional reasonableness. Nevertheless, his failings did not subject the defense to prejudice. No reasonable probability existed that a more favorable outcome would have resulted in their absence. Hence, counsel's assistance was not ineffective under either the Sixth Amendment to the United States Constitution or article I, section 15 of the California Constitution. (See generally *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218 [233 Cal.Rptr. 404, 729 P.2d 839] [discussing both federal and state constitutional provisions].)

The second point relates to defendant's claim under *Stringer v. Black* (1992) 503 U.S. ___ [117 L.Ed.2d 367, 112 S.Ct. 1130] (*Stringer*). As I stated in my dissenting opinion in *People v. Proctor, ante,* at page 499 [___ Cal.Rptr.2d ___, ___ P.2d ___]:

"In *Stringer,* the United States Supreme Court held that 'if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion' in

contravention of the Eighth Amendment. [Citation.] It explained: 'Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise context. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance.' [Citation.] Of course, California uses 'aggravating factors' – labeled 'special circumstances' [citation] – to determine death eligibility. It also uses 'aggravating factors' – bearing that very label [citation] – to decide between life and death.

"A narrow *Stringer* challenge could specifically attack any one or more of the factors set out in the standard jury instruction on the determination of penalty as vague and, for that reason, likely to invite an arbitrary and capricious choice of punishment in violation of the Eighth Amendment. . . .

"A broader *Stringer* challenge could generally attack the standard jury instruction on the determination of penalty as vague at its very core and, for that reason, highly likely to invite an arbitrary and capricious choice of punishment in violation of the Eighth Amendment." (*People v. Proctor, supra, ante,* at pp. 566-567 (dis. opn. Mosk, J.).)

Defendant's *Stringer* challenge is narrow. He attacks factor (a), the "circumstances of the crime"; factor (b), the "presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence"; and factor (i), the "age of the defendant at the time of the crime."

At the outset, the majority "[a]ssum[e] without deciding" that the factors set out in the standard jury instruction on the determination of penalty are subject to attack for vagueness under *Stringer.* (Maj. opn., *ante,* at p. 594.) That "assumption" is unnecessary. The United States Supreme Court has all but expressly decided the issue. The factors *are* subject to attack. (See *Bacigalupo v. California* (1992) 506 U.S. ___ [121 L.Ed.2d 5, 113 S.Ct. 32], vacating and remanding *People v. Bacigalupo* (1991) 1 Cal.4th 103 [2 Cal.Rptr.2d 335, 820 P.2d 559], for further consideration in light of *Stringer v. Black, supra,* 503 U.S. ___ [117 L.Ed.2d 367, 112 S.Ct. 1130].)

The majority then proceed to reject defendant's *Stringer* challenge. They do so because they themselves do not find factors (a), (b), and (i) to be vague. But "[w]hat is dispositive is not what jurists on appellate courts may announce, but what laypersons on juries may understand." (*People v. Proctor, ante, supra,* at p. 567 (dis. opn. of Mosk, J.).) In this regard, consider factor (i). We have held that "age" can be aggravating or mitigating or neither depending on the peculiar facts of the individual case. (E.g., *People v. Lucky* (1988) 45 Cal.3d 259, 302 [247 Cal.Rptr. 1, 753 P.2d 1052].) Whether a juror would come to the same conclusion, however is another matter.

In the course of their analysis, the majority appear to suggest that if a factor is not vague, it necessarily passes muster under the United States Constitution, even if it "leave[s] the sentencer free to evaluate the evidence in accordance with his or her own subjective values." (Maj. opn., *ante*, at p. 595.) Such a proposition would be too broad. The requirements imposed by the federal charter are substantive as well as formal. Thus, a factor, no matter how clearly defined, is constitutionally invalid, if for example, it authorizes or allows a juror to "attach[] the 'aggravating' label to" matters "that are constitutionally impermissible or totally irrelevant to the sentencing process, such as . . . the race, religion, or political affiliation of the defendant" or "to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness." (*Zant v. Stephens* (1983) 462 U.S. 862, 885 (77 L.Ed.2d 235, 255, 103 S.Ct. 2733].)

With that said, I note that a successful *Stringer* challenge does not automatically result in reversal. As *Stringer* itself makes plain, an instruction incorporating a vague factor is subject to harmless-error analysis. (503 U.S. at pp. ___, ___ [117 L.Ed.2d at pp. 379, 383, 112 S.Ct. at pp. 1137, 1140].) On this record, even if one or more of the factors defendant attacks are deemed vague, no prejudice appears.

In conclusion, having found no reversible error or other defect, I concur in the judgment.

KENNARD, J. – I concur in the result and the reasoning of the majority opinion except for its conclusion that, assuming we must evaluate the aggravating factors in

Penal Code section 190.3 to determine whether they are impermissibly vague in violation of the Eighth Amendment, factor (i) ("the age of the defendant at the time of the crime") is not vague. I see no need to resolve this issue here. Because defendant's age played little role in either the evidence or the argument at the penalty phase, any vagueness in the trial court's instruction to the jury on factor (i) was harmless under any standard.

SUPREME COURT OF THE UNITED STATES

No. 93-5131

Paul Palalaua Tuilaepa,

Petitioner,

v.

California

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of California.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 2 presented by the petition. This case is consolidated with No. 93-5161, *William Arnold Proctor v. California*, and a total of ninety minutes is allotted for oral argument.

December 6, 1993